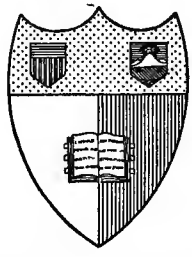
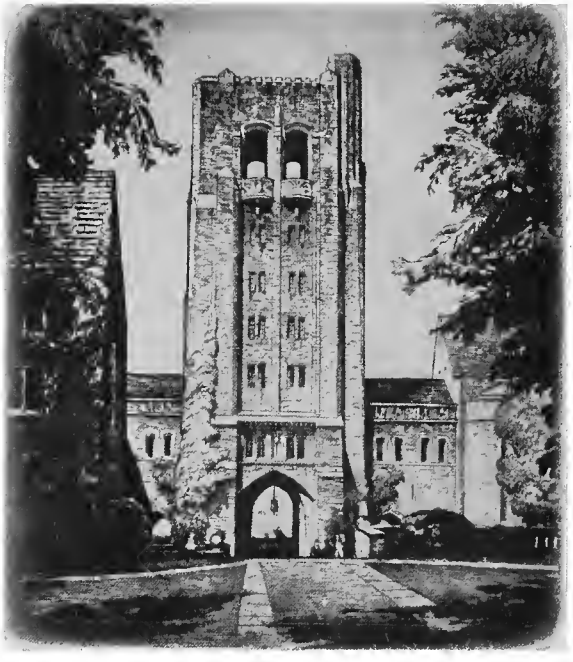
ILLUSTRATIONS
IN
ADVOCACY.

HARRIS.





ILLUSTRATIONS IN ADVOCACY.

EXAMPLES OF CONDUCTING THE PROSECUTION AND DEFENSE OF CIVIL AND CRIMINAL CASES.

INCLUDING

METHODS OF CROSS-EXAMINATION.

ALSO

CICERO'S DEFENSE OF ROSCIUS FOR MURDER, AND THE STORY OF THE TICHBORNE TRIAL RE-TOLD.

BY

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First American from the First London Edition.

REVISED AND ADAPTED TO THE AMERICAN PRACTICE BY AN AMERICAN LAWYER.

ST. LOUIS, MO.:
WILLIAM H. STEVENSON,
LAW PUBLISHER AND PUBLISHER OF THE
CENTRAL LAW JOURNAL.
1885.

PREFACE.

As Experience is the severest school, so mistakes are its hardest lessons. My business is not to teach, but to give the result of my observations, and my observations have been principally directed to the leading men (nominally) in the profession. Were I ever so great a teacher I could never hope to teach my leaders, nor could I expect them to condescend to be taught. But if I could not induce them to be learners, it is no reason why I should not compel them to be teachers. Many of them are so full of instruction, to say nothing of amusement, that it would be a thousand pities to let it flow away, without so much as sprinkling the thirsty inquirers for knowledge, who sit watchful and gasping on the banks of this bountiful stream!

The world is full of teachers—do not let it be supposed that I wish to add to their number—let me rather be the entertaining companion of an idle hour. By this means my book will not be confined to the limited number of aspirants to Forensic honors, but will extend its circulation to the world of readers, who sometimes require a change from the tideless deep of philosophy, or the gushing rivulets of romance.

RICHARD HARRIS.

LAMB BUILDING, TEMPLE,

London, July 1st, 1884.

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ILLUSTRATIONS IN ADVOCACY.

CHAPTER I.

PRELIMINARY.

In writing these illustrations I have endeavored to effect three objects:—first, to give the young advocate some warning of the dangers that lurk in his path, without alarming him; secondly, to indicate the means of escape, without involving an inglorious retreat; and, thirdly, to entertain him on his journey, without frivolity.

In surveying a wide expanse of country we obtain glimpses of beauties as well as blemishes; but the beauties are not always to be courted, nor the blemishes to be avoided. In advocacy, I observe rather its mistakes than its perfections. The

former you may fix as landmarks to guide your course; the latter you can scarcely hope to appropriate as possessions. Moreover, the blunders are common property, which everyone has a right to deal with as he pleases. Perfections are the inheritance and birthright of the few. We may toil on towards perfection, and even approach its enchanting confines; but the *way* is rugged and wild, strewn with the errors of those who have preceded us, and dangerously near the treacherous quagmires, towards which the spectral dazzle of cross-examination, lures us to destruction.

If I presumed to set up an adviser of reckless youth, I should say seek only to avoid blunders; take no thought for perfections, they will take care of themselves; they are not necessary to your existence; and even, if they should stimulate your ambition, they should never divert your attention from its duty. Labor not to be rich in display, but to be competent in your homely requirements.

Looking around, then, from our little hillock of observation; and, permitting the eye to rove unchecked over the vast field before us, we perceive that many persons regard advocacy as a rough and tumble *Scramble*, and not as a delightful and fascinating Art; as a Game, boisterous and rude; in which you are supposed to pick up what you can; as a Football match; in which the Cause is kicked about, amidst much unnecessary confusion, from pillar to post, from hedge to ditch; where nobody's

shins are spared and no one's susceptibilities regarded. Advocacy is not this; it is more a matter of nice calculation and foresight, where one move may affect many; where the object of the mover is not always visible, till its success is assured; and where your probable move is calculated upon the possibilities of your opponent's.

No one can go through the Courts without seeing that cross-examination often proceeds without method, order or system; as though it were a haphazard kind of business that has to be done mechanically, as the officer administers the oath to the jury. You may see everyday advocates cross-examine as though their object were to develop, not their own case, but their opponent's. They ask questions which the other side cannot, or dare not, ask; and, instead of breaking down their opponent's case, they build it up in the strongest possible manner, as though they had been retained on the other side. Nor is this unskillful mode of proceeding by any means confined to juniors.

I daresay everybody thinks he could "do a breach of promise of marriage;" and wishes he only had the opportunity of "bringing himself out" with one. It looks so remarkably easy, and is so full of excitement and fun! Fancy reading the love letters! So, anybody could drive a locomotive, in the sense of pulling the lever and setting the machine in motion. But what if you don't understand the gradients of the line, or the signals? What if you don't know how to regulate pace and put on and

shut off the steam? and how to apply the brake when necessary? Where, I wonder, will your passengers be, should a goods train or an excursion be a trifle late? Why, you will come into collision with the judge and jury before you can sound your whistle. Advocacy is not quite pulling a handle and going ahead. I make these observations, because I intend to take, as my first illustration, an action for Breach of Promise of Marriage; and, without attributing blame to anyone except the client, I intend to show how the defence in a breach of promise may collapse from want of proper treatment, even with the tender nurturing of an experienced nurse. The course of advocacy does not always run smooth. For the sake of my illustration the case must be one, where, albeit the lady was pretty and the promise broken; no substantial damages, under the circumstances, could have been secured without some untoward event. There might have been a farthing or a withdrawal of a juror. I have chosen a curate of High Church proclivities, as the defendant, because it will make the case more interesting, and lend an additional charm to the fascinating scene. It is not often we get a clergyman to play the part of defendant in such a case; but, when we do, the excitement becomes intense and the action religiously picturesque.

ILLUSTRATIONS IN ADVOCACY.

CHAPTER II.

IN ACTIONS FOR BREACH OF PROMISE OF MARRIAGE.

From a somewhat careful observation, I have reluctantly come to the conclusion that in five cases out of six I would back the advocate and not the case. This may sound rather like sporting phraseology, but it is not the less expressive or true on that account. I would not compare the ordinary advocate to the great jockey who, as a rule, gets the best "mounts," for the ordinary advocate cannot always choose his mounts, and often gets put on a rank outsider. Nevertheless, it is the advocate after all that I would put my money on. An utter-

ly bad case is good for a young counsel, but a great one will hardly ever entertain it. He picks the cases he will conduct, and likes something that "has a leg to stand on," something that will "go."

His chief power, when he is compelled to fight a bad case, lies in attack, and if he can break down the good cause of his opponent he is a long way on the road to establishing his own. Suppose then we start with an interesting action for breach of promise of marriage. A good advocate will almost win a case of this kind before he begins, while an indifferent one will sometimes lose it even if the jury give him a verdict, for in all probability the damages will be so small that his client will be left in debt to his solicitor for costs.

There is no more popular action than that for breach of promise of marriage; none more distasteful to a judge or interesting to a jury, and I trust it will never be abolished, because it at least acts as a check to artless and fickle prowlers after beauty, who make a mock at the feelings of the too trustful and confiding fair one, whose chief prospect in life is a happy marriage. Abused this form of action unquestionably is, and so is every other form; but it has mainly been brought into contempt by the ridiculous handling which it has undergone by unskillful advocates. In a business-like manner it is seldom managed. Sometimes counsel think it an occasion for humor; but if it were, how many advocates are there who possess this quality? What humor is there in the ordinary speeches that too

often transform the luckless plaintiff into a laughing stock before ever she comes into the witness box? What of such an observation as this:—

"Gentlemen, it has been well said that the course of true love never did run smooth." There is nothing humorous in the saying, yet it provokes a laugh! And why? Because everybody knows that the learned gentleman is about to lay bare some of the tenderest feelings of the human heart, and to wound its most delicate susceptibilities—he is about to dress up pure sentiment in the raiment of unseemly language, and to present a tawdry picture of a living passion. It is the forseen incongruity that provokes a smile, and not the humor of the counsel. The same laughter is produced when he attempts the sentimental. He unconsciously, and in a mild and shadowy form, imitates Sergeant Buzfuz. He is Buzfuz without his power. He does not reach the hearts of the jury, but unconsciously provokes their sense of the ridiculous:—"Gentlemen, what money can compensate for injured feelings, for blighted hopes, for blasted prospects, for the loss of all that happiness that she fondly believed was in store for her? You cannot place her in the position she once occupied with her heart at her own disposal, for that heart is already given away, although given to one who is unworthy of it; but you can do this, gentleman, you can give her such compensation as you think her entitled to, and you can punish this man in the only way in which he can be punished,

and that is by making him pay." It comes to this: "How much for this heart, gentlemen?"

That is an eloquent speech, truly; I have heard it scores of times, but it begets no sympathy—it brings no damages. If damages are obtained they are obtained by the facts and not by the speech which generally reduces them. Moreover, it is an incorrect mode of putting the case, as the judge will by and by point out. Punishment is not the object nor intention of the action for breach of promise of marriage. Punishment is inflicted for a crime or misdemeanor. A breach of promise is neither the one nor the other. And although the advocate probably intended his remark to be figurative, the judge will so strip it of its figurativeness that it will appear as a naked untruth at last, or worse, as a legal deformity. "The measure of damages," the judge will say, "is what the plaintiff has lost by the non-performance of the contract, and anything you may award as compensation for injured feelings. *No punishment to the defendant.*" Cases are too frequently opened as the boy opened the bellows to see where the wind came from.

With these prefatory observations I will introduce the reader to the court where this exciting action is about to take place.

I observe that there has been a desire to settle, so as to prevent the scandal which must arise from the proceedings being gone into; and no wonder, for the whole country will read the report of this ecclesias-

tical romance. The action is brought by a very interesting and strong-minded lady against an interesting High Church curate. Some talk there has been of a settlement to this effect, that there shall be no damages and each party pay his own costs. But a breach of promise is not repaired like that. The case looks as neat and capable of winning as beauty ever is; so all overtures of this kind are scornfully rejected. The parties might have arranged matters before a penny had been spent in litigation, if the fair promisee had been so minded. But so minded she was not, and is not disposed to haul down the flag when victory is waiting her. High Church, therefore, looks contemptuously down from its frowning height and waits result.

It is a great satisfaction to the eager public who have come so far to see the conflict. People came from all directions like the throngs who went to witness the tournament at Ashby-de-la-Zouch in the olden days. Every inch of court was filled up. Rosy-cheeked country lasses beamed with excitement and modesty. Fair country ladies pressed up to his Lordship's chair. His Lordship peeped out from the centre of a living radiant bouquet. It was a pity that the young curate sat in court, for he was the centre of at least four hundred yearning eyes. He would hardly have been more attractive in his vestments. The dear young things quite gloated on him. What a sweet little suppressed titter and rustle of expectation there is in the galleries! You can almost hear the beating of their tender hearts,

as the well-dressed crowd is speculating upon the interesting particulars that will be revealed of curate life and curate love, and wondering whether anything in the shape of scandal will be disclosed. We may even find out, think the male portion of the audience, what is that mystic religious influence which makes the curate so attractive to female minds and so penetrative to female hearts.

I can promise the eager crowd that they will find out nothing of this from the opening of the case, or from the examination-in-chief; and the most that will ever be learned from those sources of information, unless I greatly mistake the advocates, is that if you want to catch a curate you must *warm his feet*, that is, begin with the *slippers*. I do not predict that this is how the counsel will open the case. He was far too shrewd an advocate to make a clumsy jest of a serious contract. *Contract or no contract was the first point.* The pleadings said the promise was conditional, and the condition had not been fulfilled. The condition set out was that the curate would not marry until he was in a position to do so. The position aimed at was a snug, comfortable living. So there was business to be done in this opening; and the business was to show fulfillment of the condition, or waiver of it by the defendant, or *a subsequent unconditional contract.* To the latter part mainly the counsel's efforts were directed, although, by means of an interesting correspondence, they endeavored to establish not only this point but the waiver. So you see there was some-

thing of art here. The one point held in reserve as the decisive trump card, not to be thrown away or played too soon; and another card or two, likewise held well in hand, capable of taking tricks. A good hand it certainly is, and might be thrown away very easily. But not by Mr. Longfellow, the plaintiff's counsel. Bless you, he knew the value of his opponent's cards by one or two inadvertent observations.

"Not necessary," says High Church Counsel, "to read all the letters."

That immediately raises the suspicion that he is afraid of them. They are certainly not in his favor, and therefore it is best to see every page of this delightful correspondence. Every letter must be read after this; there may be a waiver in some and a fresh promise in others. Very few sensible men are afraid of *ghosts* nowadays, so there is something more than a suspicion that in the mind of the defendant there is substance in the letters objected to. First point, reader, which "having found make a note of."

It was not a sentimental opening. Sentiment is generally out of place in the construction of a contract, so the learned counsel postpones sentiment, and deals at present with hard concrete facts. It will be time enough to touch up the feelings of the jury when he replies. You may sometimes advantageously excite the compassion of a jury in your opening; but you will not be wise to do so if there are to be many witnesses and a number of letters

submitted to their judgment. Let us have the business first, and if that can be satisfactorily settled, the time may come when sentiment may be invoked as a powerful auxiliary to *increase the damages.*

Let the facts speak. If they are ambiguous you have argument; if they are clear you want none. When proved you have your measure of damages to consider, and then will be the time to estimate the conduct of the defendant, the position of the plaintiff, and the injury to her feelings, all which topics must be handled without maudlin sentimentality or exaggeration. Manhood must prevail.

So Mr. Longfellow, Q. C,, opened the case in a very business-like, unromantic, and common-place manner, much the same as he would open a case for damages for non-delivery of goods. What mattered that the goods were a curate? There was the promise and there was the non-delivery. It was enough, as will be seen by the progress of the case, and yet it was but a little, as was shown by the evidence. If you promise you must perform, or—pay. The defendant promised a curate, and did not deliver him. That's the simple case.

I am not going to write the tittle-tattle of the trial for the amusement of the lay reader. I leave that to the newspapers, and content myself with giving the real points of the case for the information of the advocate, with such extras, or, as the Americans would say, fixings, as may be necessary

to enable the general reader to appreciate the circumstances.

There was an absence of all that flimsy jocularity in the opening, which so often damages a plaintiff's case, and there was no attempt at ridiculous pathos. The injured feelings were left in the background like an ambuscade, ready at the right moment to spring out and deliver a deadly fire just when it was the least expected; no concealment of facts by maudlin sentimentality, but the sentimentality left to be discovered by the facts. If your facts can do this you need not, if they cannot you cannot.

The plaintiff was as prepossessing in appearance as any plaintiff need be; but I should say she was a lady of strong will and considerable mental capacity —far to heavily freighted, one would think, for the wife of a curate—more adapted, perhaps, for the consort of a bishop. Her capacity for letter-writing was known by its fruits, of which there was an abundant harvest. How the love-making began need not be written. Everybody knows that with the Church it must begin humbly with the slippers. It is a malady, as young ladies are well aware by unmistakeable diagnostics, which quickly develops, and when it reaches the heart the patient is gone. There was plenty of talk, you may be sure, in the progress of this love-making, about cassocks, stoles, albs, altar-frontals, chasubles, and the rest of the gaudy ecclesiastical millinery so dear to the female heart; and there was much interesting evidence of endearments that sometimes spring from the sweet

harmony of souls in a state of grace, through all of which sweet Love threaded her silent course, all unobserved and unobtrusive, gently spinning her mystic toils in quiet strength around the heart of the beautiful curate.

The story came out well in the examination-in-chief—there was not a gap discoverable anywhere. It was like a charming piece of ecclesiastical embroidery where the pattern is graceful and complete and you see the golden thread everywhere in its simple and tasteful beauty. Still, there was an impression throughout the Court that the superior mind was in the witness-box, and the weaker under the counsel for the defence, and that the mind and passions were in harmony. The plaintiff unquestionably was the possesser of strong feelings; in fact, she was what you might call "clinging" in her loveliness. The attitude she assumed in her devotion reminded one of the position of the confiding female in the picture clinging with rapturous agony to the rock, which is in the shape of a rough-hewn cross, while the billows are breaking around and above her. Now, I would observe that a strong-minded lady in an action for breach of promise is not always a good witness. She is generally too emphatic and too certain—too absolutely *there*. Juries glance at her and think what would be their domestic freedom under such a government. No witness makes less impression than a hardened scientific female; the next to her is the strong, confiding, clinging, sentimental, religious, creature,

who throws herself into every adventure as if she were taking a header from a boat. Her case is too absorbingly good, and she is always too much injured.

Not a great deal of damage was done by the story of the love-making, the taking up by the defendant of his abode in the house of mamma "for the sake of companionship and convenience," the having some one to care for and to comfort him, the slipper-working and the slipper-warming; the getting-up of evening classes, the discussion of abstruse doctrines of divinity, the reading together in the Greek Testament, the discourses upon the Athanasian creed and the colors of the curate's vestments. All these and a hundred other pious incidents of ecclesiastical life in a country town, were but common-places which might have been compatible with platonic friendship. What an artless, innocent question was now put in faltering accents, and with suppressed emotion.

"And after all this treatment are you—excuse my asking you—but are you fond of him still?"

The plaintiff looks at the downcast, helpless curate with longing, yearning eyes for a minute and-a-half, and then, clasping her pretty, delicate hands on the ledge of the witness-box, exclaims:—

"Oh, yes—very, *very* fond of him!" and then she puts her lace bordered handkerchief to her eyes, and plainly visible in her whole form is the deep emotion which stirs within her, as though some volcanic eruption were imminent. This touch of gen-

uine sentiment does really make the jury look up for a moment, and every bucolic eye beams with sympathy. It was splendidly done, and you could not for the life of you tell whether it was real or the quintescence of acting. At this supreme moment every female eye, moist with sympathy, was turned upon the defendant. Every feminine heart palpitated with an indefinable yearning; and every gentle bosom heaved with tender emotion. At this ecstatic moment what an interesting creature the high Church curate was! Never in any Court was produced such a delicate and delicious sensation! What a real living drama was being enacted! Then once more those lustrous, dangerous eyes of the plaintiff beamed at the faithless clerical swain over the damp handkerchief, and from their innermost depths welled out the passion of those bygone days; and, oh! what a depth it was! Very, very deep!

As the learned counsel for the defendant artistically arranges his papers, and with ceremonious dignity rises to cross-examine this heart-broken plaintiff, what breathless emotion there is in the galleries! Every lady readjusts herself, for the long anticipated treat is coming. They all expect her to be cut up, and her innermost heart laid bare. The scene will be nothing without this scientific anatomical dissection. All depends upon the cross-examination. The Church can hardly go into the witness-box and deny the promise or the breach. She may sit in Court and suggest questions, expose secrets, and otherwise assist the plaintiff; but there is no cer-

tainty about her submitting herself to the ordeal of cross-examination. The counsel needs to be subtle, acute and skillful, for he has to deal with a clever, self-possessed, albeit heart-broken, woman, who can see right through him, as though he were made of the most translucent glass.

"Now," he asks, with placid and gentle tones, "did you frequently converse with him about marriage?"

"Oh, yes," answers the plaintiff; "frequently—frequently. It was his constant theme."

"You liked it I suppose?

"Oh, yes. It was agreeable." (A sigh.)

"You were desirous of marrying him?"

"Certainly. Why should I not be? I loved him."

No bashful reserve you see; no insipid hesitation. All was business-like and straightforward; pure as the stream and open as it course. So far so good. And the jury think she was pretty well up to her work.

"Did he tell you that his income would not permit him to marry?"

"Oh, yes; many times." (How she helps the learned counsel in his cross-examination.!)

"And said he would not marry until he had a living of his own?"

"He did. Oh, yes; many, many times."

"What did you say to that?"

"That I would try and get him one, of course?"

Here there was considerable laughter; the learned

judge himself moderately and judicially sharing the merriment. The javelin men and ushers all laughed, and all shouted "Silence!" and then gave way to their feelings again, all placing their hands in front of their mouths.

"Well," continues the counsel, "you never got him one, did you?"

"Not actually got it, because he refused to accept it."

"But did you get him one?"

This was a question too many, the answer was "Yes," and it necessarily led to further and better particulars. Having been put in cross-examination, it must be cross-examined upon, and that is one danger of a question too many. You have to try and get rid of it, to qualify or alter it, which you seldom can. It is like the letting out of water—the stream increases, and of its own force widens the breach.

"Where did you get him a living?"

"At St. Swithin's."

"Do you mean to say St. Swithin's was ever offered?"

"Oh, yes; and *I have the letter to prove it*!"

"We'll have that letter in," says Mr. Longfellow. "Oh, yes, we'll have it in. I don't wish to conceal anything," says the High Church counsel, with charming innocence.

And then comes the letter, carefully preserved by the plaintiff, who valued every scrap of paper that bore the defendant's handwriting. It was a simple letter enough; one would have thought not worth

preserving; but it turned out to be valuable in this way, that if the promise of marriage had ever been conditional, the letter proved that the condition had been faithfully performed.

The case, therefore, was well on its legs, such as they were, but a tottering sort of creature it nevertheless appeared, quite incapable of bearing any appreciable weight of damages. There had been too abundant spiritual excitement; too much slipper warming. The mystical union of souls had been too frequently insisted upon; and it was somewhat difficult to ascertain whether the attachment had been the highly sublimated process of spiritual attraction, or the more worldly and more generally understood proceeding called "courtship." It will be tested, perhaps, by-and-by. and its true nature revealed.

As a rule, a defendant in a breach of promise should not be in Court, unless his personal appearance is a good defence to the action. In the present case, the defendant unfortunately was present, the silent and downcast spectator, as well as the object of intense admiration to all the female portion of the audience. He was at once a hero, a champion, a conqueror and a martyr. Up to this moment I envied him. It was curious to notice how, when any interesting question was asked, all the beaming female eyes were fixed on the pretty plaintiff; and how, when the answer was given (equally interesting) all those eyes immediately turned and riveted themselves on the reverend defendant. It must have been

like sipping honey to the gushing fair ones in the gallery; and I believe the case was so exciting that the young ladies would alternatively have liked to be now the plaintiff and now the defendant. It was so inexpressibly sensational. At present, however, there seems but a remote chance of any damages that could be termed substantial. But now a phenomenal question shoots across the legal firmament, arising, no doubt, from special instructions, which gives importance to the case; the whole atmosphere, in fact, is ablaze.

"Is it not a fact," asks the counsel, "that the defendant and you were three weeks in the house without anyone else being there?"

A pregnant question truly! What a flutter there was in the gallery! Now the scandal's coming!

"Oh, the clerical profligate!" and "Oh,—" well let us wait. What, is she going to deny the "soft impeachment," the mild imputation, the suggested profligacy? Shame! Are there no dark pious mysteries to be revealed? no slumbering secrets to be awakened for the delectation of this excited audience? Surely, something has been whispered by those consecrated lips into the learned ear of the enterprising counsel! He would not, could not, as a Queen's Counsel, with a dignity and reputation to support, have so alarmed the heavens with mere fireworks. Oh, no, something must come of it, if its only an earthquake. To change my simile, this love in a cucumber-frame, (I mean this clerical

forcing-house), is not going to evaporate into sighs. We shall reap the fruit of our patient expectation in due time, because *no question is put in cross-examination without adequate motive, and without the utmost certainty that the answer cannot injure your client.*

The dear girl was taken all aback; up went her handkerchief to her eyes, and she made a succession of bubbling noises very like what you hear when you pour water rapidly out of a narrow-necked bottle. After the water was all out the fair and broken-hearted promisee gave a little shriek, and cried—"Oh, no—no—no, my lord! Oh, no—*never*! Oh, how cruel!" and she refused to be comforted. Every one pitied her, except the counsel for the plaintiff, and they pitied the defendant.

"Now," says Mr. Longfellow's junior, "*you've got him.*"

"Hold your row!" says Longfellow, with a wicked expletive, in a small whisper. "I know! Now he shall have it. We've got him nicely!"

It took some time for the addressed plaintiff to recover her equanimity, and compose her nerves, because after such a severe shock to the physical, mental and moral systems several heart-rending relapses were necessary, and water had to be brought. You can't get over a big thing like that in a moment, whatever your courage and virtue may be.

I never knew why the question was asked, and if

the reader thinks it over for a month he will be no nearer to a solution. At first I imagined it was to lay the foundation for saying that the defendant had seduced the plaintiff as well as deceived her; but even if so, one could not perceive how it could go in mitigation of damages. Nor could I understand how it in any way went to the lady's credit. Nor how it affected either the promise or the breach. Truly it was one of those mysterious displays that, like erratic play at whist, defies all calculation and conjecture. But it finished the cross-examination, you may well believe, and very nearly killed the plaintiff. If it had killed her it would have been the defendant's only way out of the difficulty; for Lord Campbell's Act could not have helped her relatives.[1] But, unfortunately for him, such is the springiness or elasticity of the fair sex in actions of this nature that she recovered sufficiently to be re-examined—just sufficiently, and no more. And in what a grave and business-like manner she was re-examined! All amusement had vanished. Things had assumed a serious aspect, approaching almost to indignation. The earthquake must come. The defendant hung his head, as well he might, repentant when too late, but bearing with Christian meekness and resignation the pitiless storm as it bore down upon him. From all sides the storm came; even from the galleries, because, after exciting the

[1] In other words an action for breach of promise of marriage does not survive. Stebbens v. Palmer, 1 Pick. 71; Wade v. Kalbfliesch, 58 N. Y. 282.

curiosity of the fair auditors with an appearance of approaching scandal, it was a shame to leave it ungratified. What, shall there be no stain upon the plaintiff's character? What could be the meaning of such a question unless it was to be followed up by at least an insinuation that the plaintiff was no better than she ought to be. It was cruel (not to her, but to the fair sex in the gallery), and the disappointment was unbearable. They quite assented to the volley of indignation which was indirectly poured upon the meek curate's head. There ought to have been something piquant after such a question; but not too much indignation, if you please, because you don't want to do all the punishment in re-examination, or even in your speech to the jury.

After all, the defendant may go into the box and deny the promise, or it may even be hoped he will contradict the lady about the house business? But no: he's only a spectator in the scene; he has come like the rest of the audience, simply to hear the trial, and probably to learn some useful lesson in human nature for the delectation of his congregation next Sunday. He contradicts nothing, and does nothing but hold down his head as Longfellow anoints it with a copious shower of delicate invectives, and points to him with a substantial and well straightened finger of scorn as he says, "That's the man who dictates that foul insinuation against the virtue of the woman he has wronged." It was a good speech, was Longfellow's. You could tell

from it that Longfellow was a father, and that the jury were fathers, and the jury nodded their fatherly heads as he glowingly recited the wrongs of the lady, extending, as they did, over a series of years, and culminating that day in the foiled attack upon her character in the witness-box.

Longfellow's speech was like a good clap of thunder; not the least uncertainty in its meaning; no one could mistake it for the ill-natured growl of an angry churl, and it did all the work which was required of it. Declamation was its chief feature, and aggravation of damages its main object. Now there was only one way to aggravate damages in this case, and that was by aggravating the feelings of the jury. You couldn't go into pounds, shillings and pence; all that was beside the question The jury had *seen* the injured feelings, and they saw that no money within the probable means of the defendant would be too much to make him pay after the exhibition he had made of himself in court. Mr. Longfellow's clap of thunder burst with blessings on the plaintiff's head, and down came a copious shower of golden damages. There was no need to awaken sympathy; no necessity to go into figures; and although the judge said they must not punish him even for the phenomenon he had insisted upon shooting into the heavens, the jury gave the plaintiff a verdict for a good many hundred pounds.

The fair sex drew in its breath and speculated on its own chances of a verdict on some fine day.

The plaintiff was being comforted and soothed with *sal volatile* and *eau de cologne* when the verdict was returned and she just revived in time to be escorted out of court by her sympathizing solicitor before the fair sex could rush from the gallery, and make her a gaping stock in the hall and the street.

Everybody said it served him right, but no one said it served the plaintiff right. Let the student draw all necessary inferences. It is not for me to point the moral more significantly than by saying the action was for Breach of Promise to Marry but the verdict was for Slander!

CHAPTER III.

IN ACTIONS ON COVENANTS IN BILLS OF SALE.

We find ourselves again in a Court of Justice. As we enter, the case of *Hawk* v. *Sparrow* is called on, and the learned counsel for the plaintiff opens it—admirably opens it. Poor Sparrow, there is no chance for him evidently! What a wicked sparrow he seems to have been! Years ago, it appears, he was a market gardener, and had befriended a grocer, by lending him, from time to time, sums of money which at last amounted to £150, and for as much as the grocer, whose name was Thriftless, had nothing to pay, Mr. Sparrow asked him for a bill of sale on his household goods. Mr. Hawk, being Thriftless' lawyer, drew up the bill of sale, and Sparrow advanced a sum of £30, taking the bill of sale for £180. Thus the money was secured, so far as a legal document could accomplish that object. Some time after, Thriftless, going from bad to

worse, gets into liquidation, and so wipes out his debts; but Sparrow has nothing to do with the liquidation and after the proceedings were over, Thriftless continues to pay the interest on the bill of sale: an illegally immoral proceeding, no doubt. Now, Sparrow was to pay Hawk for drawing up the bill of sale, in the event of Thriftless failing to do so. Thriftless did fail to do so, and then Hawk applies to Sparrow. Upon this, Sparrow says in his little chirping way, "I can't be bothered about this thing for ever; I thought it was all settled; but I will tell you what I will do. If you like, Mr. Hawk, you shall have the bill of sale in satisfaction of the costs incurred in drawing it up, and some few pounds I owe you for other matters"—all incurred through Thriftless.

Hawk flies at this proposal, with his talons wide spread, and takes the bill of sale in satisfaction, and there the matter seemed amicably ended. This was twelve years ago. Time rolls on, and now Hawk, having grown grey in the pursuit of his profession, sues Sparrow *on a covenant in the assignment of the bill of sale*, which was to this effect: —Sparrow covenants with Hawk that the said debt was *a good and subsisting debt.* The counsel opens that it was not a good, subsisting debt or a subsisting bill of sale at that time, because all liabilities had been washed away by the flood of liquidation proceedings.

The judge nods his head at this, and evidently

thinks it an undefended case. The judge is "against the defendant:" expresses himself to that effect, and counsel for the defendant seems in bad case. It's an up-hill fight when the judge is against you; but if you believe your sparrow has a feather to fly with, you ought at least to afford him the opportunity of a little flutter. Perhaps the judge doesn't know your case, and may alter his opinion when he does.

"What answer to this have you got, Mr. Jones?" asks his lordship.

Now Jones, be firm! don't disclose your case even upon this seductive invitation before even your opponent has made out his own. Let us first of all *see what case the plaintiff has, not upon the opening but on the evidence.*

It is as dangerous a proceeding to disclose your hand prematurely as for a general to send to the enemy a message informing him that at a particular time he should take possession of a certain pass, make a flank movement on his enemy's left, throw out his right wing, and then, covered with artillery on the north, totally envelope the opposing forces.

As the judge asks the question, just glance your eye at your opponent and see with what an eager glance he awaits your answer. But if you are wise you will not satisfy that watchful glance. He is turning over the sheets of his brief and looking you hard in the face all the while. But you *must* answer his lordship, and so you say you believe you will satisfy his lordship when your turn comes: at least, if

your instructions are correct you have a complete answer. You may be young, no doubt, and your opponent may be old and wily, but you have lived long enough in the world to know that he cannot catch even a sparrow by putting judicial salt on his tail like that.

"Very well," says his lordship; "only it seems to me you are bound by the covenant."

"Not till after verdict, at all events," thinks the imperturbable Jones; so he says respectfully:—

"I hope to alter your lordship's opinion when you hear the case. At present my friend has called no evidence."

"Oh, don't let me interfere, I pray!" says his lordship.

So not a man of Jones' troops moves, and there is no message sent to the enemy of his intended operations. Possibly, Jones may take him in the flank or rear by a well-concerted line of action by-and-by. We shall see.

But here is a very benevolent gentlemen stepping into the witness-box, and he looks a saint indeed with the precious Testament in his hand. This is Mr. Hawk himself. How beautifully he gives his evidence. You almost parody the touching line of Watts:—"How neat he spreads his bird-lime!" Never was evidence more fairly and temperately given, and if ever there was a counsel who knew how to examine a witness-in-chief it was Hawk's. He never omitted the smallest material detail. He reminded me of a sharp boy piecing together a puzzle

map of the world. One after another in went continents, rivers, rills, hills, dales, lakes, waterfalls, and everything that goes to make a complete hemisphere.

The learned counsel left out nothing, not even so small a county as Rutland; but I *have* known boys leave out not only a county, but a country as large as Russia, and then wonder why their world is not complete, and abuse the maker of the map. Depend upon it, no case is complete unless you have all its parts; and it was a *knowledge of these parts, and of their relative positions with regard to the whole*, which made the learned counsel for the plaintiff in this case so formidable an antagonist. It seemed impossible to get over this well-adjusted evidence. Not a gap or a fissure was visible, every tree and ditch were there. Nothing daunted, however, the placid Jones commences his cross-examination after the manner of a man who feels that there is a wrong adjustment somewhere. He has to get rid of that covenant which his lordship seems to believe an impossibility; a covenant being a very hard and fast sort of obstacle, and albeit twelve years old none the worse for wear. Now, who ever heard of cross-examining a covenant out of court? How can you cross-examine a fly out of a spider's web? No spider ever heard of such a thing since spiderdom became an institution. Otherwise what's the use of webs, and what the necessity of flies? Webs as you know are fastened by means of guy-ropes to the sides of beams or walls, and if you wish to bring down the web, you have to detach first one

guy-rope and then another till the centre portion, being unsupported, comes down as it must.

The cross-examination has been evidently prepared, and every question is carefully and skillfully directed to a particular point—not always straight, mind, but always towards the object.

"Did you know a Mr. Wobbler?" asks the counsel.

The apostolic being reflects: *did* he know Wobbler? he mentally repeats. "What does he want to know for? No, yes, no!"

"Which is it, Mr. Hawk, no or yes?"

"I really cannot say; I think I have heard the name, but its many years ago."

"Let me refresh your memory. Was there a man who used to take possession for you when you put in executions under bills of sale?"

"Dear me, that is an extremely awkward question," thinks Hawk, "execution and bills of sale! Bless me! what will the jury think of me?"

"You are a solicitor, Mr. Hawk, and ought to be able to answer without hesitation."

"Let him answer," says his counsel. Question repeated. Hawk pulls down his gold eye-glasses as though they had been the cause of his hesitation, and says: "Oh, yes, to be sure! I do remember now, there *was* such a person—to be sure."

But what has this to do with the case? some judges would ask. It seems utterly irrelevant to the question of the covenant, as to whether years ago the respectable plaintiff knew a particular person.

Yes, your honors, so it does; but, your honors, as I have often perceived, do not know everything, and, as a rule, cannot be supposed to understand a line of cross-examination, which does not go through the exact issue like a thread through the eye of a needle. But your honors must be aware, if you have ever been riflemen, and had any practice at the target at long range, you never aim at it but just above or below, or at the left hand or the right, according to circumstances. You have to allow for "pull and windage."

So the cross-examination proceeds on the usual lines which, seemingly crooked, are as direct as possible, and find the real issue as certainly as the streamlet, intercepted never so many times in its course, and twisted and turned in never so many uncertain ways, finds at length the point of junction with its river or lake.

"Did Wobbler ever take possession for you under this bill of sale, Mr. Hawk?"

"Oh, dear, no!" says Mr, Hawk, quite shocked at the preposterous wickedness of the suggestion.

"Stop," says the learned judge, who from this moment perceives the line of march.

"You say, Mr. Hawk, he never did?"

"Oh, no! my lord, certainly not."

"Just look at this letter," says the cross-examiner. Mr. Hawk fusses with his glasses, and finally adjusts them with an air of confidence, like one about to look the truth in the face without being ashamed of it—as an eagle would face the sun.

"Is that your writing?"

"I have no doubt it is—yes."

Letter read, giving instructions to the said Wobbler to take possession of the goods included in the bill of sale *the day after the assignment to Hawk was executed by the defendant.*

A startling revelation, truly! quite takes the learned counsel on the other side by surprise; nevertheless, he makes a motion indicating that he knows how to get over it. However, he can't leap the ditch, and therefore knows he must wade through it somehow, there being no plank long enough to bridge it.

"But," says the plaintiff, quite gratuitously and quite as foolishly, "*he never did take possession.*"

Then the question, "Do you swear that?" acts like a bearing-rein—his head is instantly jerked up. He evidently doesn't know whether to swear it or not, but at last thinks it better to swear it.

"Now, look at this letter," says the cross-examiner; it is in the plaintiff's handwriting, as sure as he is in the box, and bears clear reference to the taking possession by Wobbler, and actually *asks for an account* of the things he seized.

But now passes through the mind of the wary Hawk a clear, good defence for the time being. He remembers that he told Wobbler to take possession, but he remembers also that Wobbler never did, and remembers it for this excellent reason, that Wobbler never gave him any account.

"Where is Wobbler?"

The plaintiff doesn't know; hasn't seen him for years; may be dead for ought he knows.

Then he is asked whether Wobbler did not sell every article of furniture that poor Thriftless had, even to his bed.

Hawk scornfully repudiates the insinuation. "Certainly not; never a farthing's worth"—this with great indignation.

It was straightforward swearing enough, and unless the counsel really understands the business of cross-examination as being something different from the knack of putting impertinent questions, this Hawk will fly away with his Sparrow after all and make a meal of him.

So he asks:—

"Do you swear that positively *of your own knowledge*, or do you swear that you *never heard of it*?"

Now, then, Patriarchal Hawk, what sayest thou? It appears to me that that is a question which, answer it as you will, you are caught as nicely as any foolish bird that was ever lured into a net. And this is a good point to remember in cross-examination, that, if by a series of questions you can arrive at one, the answer to which *must* damage your opponent, you have almost made a cripple of him.

The plaintiff being a shrewd man sees his position. He is surrounded by the enemy. He looks, not in front of but *within* himself, pauses, balances his gold spectacles, and is evidently balancing something else, namely, the respective value of alterna-

tive answers. They seem pretty equal so far as he can judge. Any answer will be awkward, may be fatal, yet answer he must.

But while this mental process is going on Jones' mind is also at work. He reasons that if he is fairly skillful he will not only get an answer to one charge of his double-barrelled question but to both, and *both answers shall be dead against the witness.* In order to effect this object he does not rally the witness and drive and goad him, so as to tempt the jury to believe he is simply bullying the man out of his wits, but proceeds quietly as though he were assisting him, breaks the difficult question in two, knowing well enough from the witness' reluctance what answer he will at last squeeze out of him.

"Do you *know*, Mr. Hawk, that Wobbler did not take any of poor Thriftless' goods?"

Suppose Hawk says yes? the next question would probably have been *How do you know it?* and the next *why* should you know it after the full instructions conveyed in the letter that has been read in Hawk's own handwriting? You can see there is something in Jones' hand which is kept well up, and it must be a good card or he would not be so confident in his play. Why should Hawk *know* that Wobbler, had not carried out his instructions? and how?

The how must be that Wobbler must have told him, and the *why* would have led *to the exact fact* which presently is proved. So the gentle student perceives as clearly as though he were cross examining himself that Hawk is well bird-limed, that he

quivers on the bough, and oscillates between a yes and a no, and casts about to see what intermediate equivocation will answer to his purpose. Then is he neatly pressed in the following manner:—

"Mr. Hawk, its a very simple question— did you know it or not?"

Hawk wants a little more time, so asks that the question may be repeated; and whenever this takes place rest assured there is at least one mark scored against the witness in the jury-box.

Question repeated, "Do you know that Wobbler did not seize the goods of Thriftless under the bill of sale?"

"I know I never had one penny-piece for my bill of sale."

Still no answer, but a clear indication of what is to come.

"Answer me, Mr. Hawk."

Mr. Hawk says there was no seizure.

"*How do you know?*"

That has fixed him. He cannot move. He dares not answer. But here Jones, for a purpose, leaves this part of the question and presses the second part in a new form. Have you heard that Wobbler never seized?

Hawk wishes he could pulverize Jones, for this question looks ten times worse than the other.

"I never got a farthing," exclaims Hawk in despair.

"You must answer the question," says his own counsel.

"I *did* hear he never seized," says poor Hawk, and now he is up to his very beak in difficulties.

"Who told you?" asks Jones, with irritating perseverance.

Well, who could have told him but *Wobbler himself*; so he is obliged to admit that Wobbler himself told him.

Now, mark what this leads to, seeing that he has never *seen* Wobbler since he gave instructions to seize. It leads to the fact that Wobbler *must have written to Hawk* about the matter, and, probably, *after* Hawk had, as is proved, written to him *for an account of the sale.*

"Did he write to you?"

"I suppose he did."

"Have you got that letter?"

"Oh, dear, no!"

"You have had notice to produce it."

"I dare say."

Copy letter from Wobbler to Hawk of ten years ago produced. Objected to, of course; withdrawn; Jones doesn't care a farthing, but asks Hawk what it was that Wobbler told him in the letter. Presses him hard on this point, and at last, when there is no escape in the wide world for this sagacious bird, he confesses that *Wobbler told him the goods were of no value and would not pay expenses.*

Anybody would have thought, to see the placidity of Jones' face as he sat down, that Hawk was his dearest friend.

Now, then, Hawk's feathers have to be smoothed

by re-examination, and a very pretty process it was.

"Oh, dear no!" says, plaintively, this martyr-like being; "not one farthing had he ever had. He really did not know anything about a seizure by Wobbler, only what Wobbler had said in his letter, which, unfortunately, he could not find. He shouldn't have seized, and then brought this action years after. Oh, dear, no! He did not ruin Thriftless, certainly not; thinks Thriftless must have been consumed by spontaneous combustion; was for many years in practice, and although, was Thriftless' solicitor, was not aware at the time he took the bill of sale that Thriftless had been in liquidation, and it was a shame to suggest that the covenant about its being a subsisting debt was artfully inserted by him because he knew it was not a subsisting debt. Oh, dear, no! nothing of the sort. Couldn't take advantage of Sparrow's ignorance in that way. Quite against his principles. Then as to this Wobbler; he had not heard of him for years—insinuating that Wobbler was a rascal.

At all this the jury smile sardonically. Clever re-examination, no doubt and they smile at the wonderful cleverness of the counsel, and the artfulness of the patriarch. There was the bond, and although the greater part of the amount for which Hawk took the assignment of the bill of sale *with the covenant* was incurred in the preparation of the bill of sale by him, yet what could be clearer than the bond? Nothing, except, the admirable manner

in which the case of the plaintiff was being conducted.

"Oh, you lawyers!" was written on the face of every juryman.

The case is getting interesting. The judge has long ago seen through it; but we must wait for the evidence which has been foreshadowed by the cross-examination.

Now, when the reader has well considered the points of the cross-examination, let him remember that at present all is suggestion, and if he had to go to the jury upon the case as it stands, he would have to insinuate three things. First, that Mr. Hawk *had knowledge of the liquidation before he got the defendant to sign the covenant*, that it was a subsistent debt. If that point be established, the plaintiff will not win. Secondly, that the defendant was not aware of the nature of the covenant he was induced to sign. I need say nothing further upon these points, because the whole arguments and inferences will flash like lightning before the mind of the intelligent reader. Thirdly, and of greater force than the other two, there was the suggestion, amounting almost to certainty, that *Wobbler did seize the goods of Thriftless and that he sold them*. Whether he gave over the proceeds of the sale to the plaintiff or cheated him out of them, is of no consequence to the jury and not relevant to the inquiry. Those are the inferences if you do *not* call evidence, and even upon those inferences the verdict would probably be for the defendant. But having evidence of a

conclusive character, Jones' able junior calls first the defendant, who deposes to this effect:—

"Knew nothing of the nature of the covenant. The plaintiff knew as much as he did of the circumstances of Thriftless" (the jury think a great deal more). So, in spite of the original strong presumption that Thriftless, signing the covenant with his eyes open, knew what he was about, the jury believe he did not know the significance of the legal jargon contained in the covenant. They do not seem to think that a market-gardener is so well versed in the technicalities of legal documents as a shrewd lawyer who had been half-a-century in practice. The jury know that market-gardeners are not usually great lawyers. Raising cabbages does not require so much pettifogging technicality as raising points or sowing the minute seeds of a prolific lawsuit. Next, and to the great surprise of the plaintiff, poor Thriftless himself was called.

And now I ask the reader's attention to some very important points in the conduct of a case, namely, those of examination-in-chief, cross-examination and re-examination.

Says poor Thriftless:—"I was indebted to the defendant, who had been very kind to me. He had lent me money from time to time, and at last he would lend me no more without security, so I gave him a bill of sale. Afterwards I became bankrupt."

"Did the plaintiff know of your bankruptcy proceedings?"'

"Of course he did."

"Why, of course?"

"*Because I consulted him about them.*"

Here the benevolent gentleman protests, by gesture and facial distortions, that this is the largest amount of perjury ever committed at one time.

The witness and plaintiff had been neighbors. The plaintiff had been his legal adviser, and they used to meet and talk occasionally about Thriftless' affairs. Grimaces, therefore, are no answer to such presumptions as arise from these facts.

"He told me," says the witness, "what solicitor to go to about my bankrupty."

"Oh, did he?"

"Yes, certainly."

Poor old patriarch What a liar he thought this witness. How a man could, &c., &c.

The next piece of evidence was that not long after, when he had got nicely settled again, his liquidation proceedings being over, and he had collected a few sticks around him, in comes Wobbler with this very bill of sale, says he has come *from the plaintiff;* and produces a letter which was *read to him, from the plaintiff himself*, and seizes every stick he had got. There were carts worth £14, there was a considerable quantity of plant which had cost £80 to set up and for which the money was borrowed of the defendant. There were tables and chairs, an eight-day clock, a mangle, a grindstone, and, above all, a nice feather bed that he and his wife slept on. All these with other things were taken under the bill of

sale. Altogether, about £60 or £70 worth, even if they had been sold by auction.

This was a surprising revelation to the benevolent gentleman, because he had sworn he never had a penny; knew nothing about any seizure, and, in fact, alleged that it was the defendant who had seized the things. Mistakes of this kind will sometimes occur; but the jury would have to judge of all these facts and of the presumptions therefrom arising. They would surely think it strange for a man to sue for a breach of covenant, which covenant was that it was an existing debt, *after the plaintiff had so far made it an existing debt by selling a man out of house and home upon it and taking his bed from under him.* But perhaps the cross-examination will set matters right, as it sometimes does.

"Now, sir, will you swear that it was not the defendant who seized the goods?"

"I will."

"Did the defendant never seize?"

"No, he never did."

"Will you swear that?"

"I will."

"Did you not have an execution put in once.

"Yes, twice."

"And didn't the defendant produce the bill of sale and turn out the execution creditors?"

"No; but that there man did—the plaintiff. He produced 'un, and——"

"Well, didn't the defendant take possession?"

"In that there way he did."

"Just answer me this. Did you ever see the plaintiff after Wobbler, as you say, seized."

"I did."

"When?"

"Several years after." (The counsel sits down.)

"Well," says Jones, in re-examination, "he asked me for more money and I says—I couldn't help swearing, my lord—I says, why you've stripped me naked. D'ye want to skin me as well?"

Has the reader any doubt as to how the verdict would be after this?

The benevolent gentleman was suing on his *bond*. Come Portia, come Shylock! It is not disallowable to refer to plays or historic characters by way of illustration. There is high authority for it. A striking parallel is always well received and generally effective. What did it matter now that Wobbler had cheated his employer? The bill was not given to cover Wobbler's delinquencies; it was only given to cover Thriftless' debt to the defendant, and as the plaintiff's agent had already received *thrice its value*, the jury returned a verdict against him.

It is often difficult to form a correct opinion of the merits of a case from seeing one side only. Even a bond may have no merits, and may be cross-examined out of court. Who can tell the configuration of the invisible hemisphere of the moon?

Caution and patience were the cardinal virtues, adjustment of facts the mechanical agent in this case.

CHAPTER IV.

IN CASES OF RECEIVING STOLEN GOODS AND OF HOW TO CHALLENGE JURORS.

My next case seems to contain instruction for a young and intelligent advocate, but I do not warrant it. By the early morning post came a letter from a country town to Alfred Jones, Esq. It contained these touching words—"Reg. on prosecution of Bowles *versus* Brown, Jones, Robinson and Smith. Please accept retainer in this case on behalf of Brown for the ensuing ———shire Sessions."

"Humph!" said Alfred, "the worst case of the bunch, I've no doubt."

Yes, Alfred, as a rule the hard-working man is retained where there is most work and most money, not otherwise. But the despondent counsel pocketed his grievance and the retaining fee. It is best to take things, especially fees, as you find them.

The next scene is the conference at an hotel on the morning of the trial. Alfred had not yet received his brief, and was meditatively smoking his morning cigar when the solicitor entered, apparently full of hope and in the best of spirits. As a rule, I have noticed that solicitors with the worst cases are in the best spirits.

"Well," says Alfred, "What's all this about?"

"Oh," answers the solicitor, "a little matter, sir. I don't think you'll have much trouble."

"Going to plead guilty, is he?"

"Well, we should hardly bring you down if he were going to plead guilty. I think you'll get him off. The facts are these."

"Never mind the facts. Tell me who's on the other side; that's the most important matter."

"I hardly know," says the solicitor; "they are very anxious to get a conviction, and talk of bringing some one special."

"Well, what are the facts? We may as well know something about them."

"I'll tell you in a few words. It's not a long story, and I believe it's a trumped-up case."

"By the police?"

"Yes."

"They generally trump up their cases pretty well, and upon a tolerably sure foundation of facts."

"Well, sir, our man, Brown, is a large proprietor of vehicles, which he lets out on hire to all comers."

"To all comers," says Alfred, mentally; "there's

the point at once, put in the most off-hand manner;" but he says nothing audibly, only smiles. The shrewd solicitor reads his thoughts and says:—

"No, there's nothing in that, sir."

"Very well; go on."

"Well, this Brown keeps a yard——"

"And a good character, I presume?"

"Well, he has a good character, and he hasn't, if you can make that out."

"Perfectly. He has a good character, but dares not prove it."

"That's exactly how it stands. There's nothing against him; but the thing is this—if we call witnesses to character, the other side may ask whether they are aware that the man has been tried before for a similar offence?"

"And what might that offence be?"

"Burglary, and receiving goods knowing them to have been stolen?"

"Is that all?"

"That's all. But he was aquitted of the previous charge, and I'm afraid to call witnesses."

"I should think so," says Alfred, in a petulant tone, and knocking off the ashes of his cigar as though it were Brown's character.

"Very good, sir," says the solicitor, making a note. "I thought you would advise that."

"Now the facts," says Jones.

"The facts are simply these. On the night of the 10th March Brown lets a horse and cart to two men, who go away with it, and in the morning

about six o'clock Brown goes into his yard, and under the shed there stands the cart, with a dead pig in it, two sides of beef, and a sheep, with a ticket in his inside."

"Sheep was dead, I suppose?"

"Oh, yes; he was dressed, and the ticket was stuck into his kidneys. Well, seeing this, and not knowing where it came from, Brown thought it had better be sold, so he goes down to the market and offers the whole lot for sale at 6d. a-pound."

"What was the market price?"

"Well, I believe the market was rather full that morning, and meat was a little down."

"What was it the day before?"

"Well, I believe the day before it was a little up; eightpence halfpenny to ninepence."

"And the day after?"

"About the same as the day before."

"Yes?" says Alfred, making a mental note.

"Well," continues the solicitor, who was beautifully imposing on his counsel, "he was bid by the butcher 5¾d.; but Brown refused to take it. 'No,' said he, 'I'm commissioned to sell it for 6d., and no less."

Another mental note.

"'The fact is,' says Brown the prisoner, 'the meat has been taken away from the sheriff's officer to avoid an execution.'"

"It would not have avoided an execution in the old days, for the man would certainly have been hanged. When you say it was taken away to avoid an execution——"

"I mean that an execution was expected, and—"

"Yes, yes; that's a totally different thing. Proceed."

"Well, it appears that this Brown asked the butcher to go and have something to drink at a public-house."

"Just one moment," interposes Alfred; "did Brown know this butcher?"

"Oh, yes; he had known him for years."

Another mental note.

"Well, they didn't have anything to drink, but Brown tells him the meat is up at his place, meaning his yard."

"Yes?"

"But before Brown gets home it turns out that a burglary had been committed at a butcher's some six miles off, and that this very meat was stolen; and the ticket that was in the sheep had *got the name of the man whose house had been broken into on it.*"

"What a very extraordinary thing!" exclaims Alfred.

"Yes; but that is not all."

"I suppose not; but it's quite enough."

"It appears that the two men who hired the cart the night before were well known to Brown, although he couldn't swear that they were the men who had hired it."

"Very curious! Did he make an entry of letting the cart in any book? I suppose he keeps books?"

"Oh, yes, there's an entry, fortunately."

"But no name?"

"No name, because he didn't know the men."

Another mental note.

"What's the next thing?"

"The next thing is that two of the prisoners, Robinson and Smith, it appears, lodged in the same house; and in Smith's room was found *another sheep* that had been stolen from the same man. That being so, it would have looked suspicious against them, only they don't appear to know anything about it. It appears that an old woman lives in this house, and is acquainted with this Robinson; in fact, is his mother-in-law,and while she was sitting up, with her back to the door, waiting for Robinson to come home, for it was getting pretty late, somebody, it appears—she can't say who—comes in without her seeing him, and drops the sheep in the middle of the floor!"

"Bless my soul!" exclaims Alfred. "Didn't she see who it was?"

"No; it appears she didn't turn round. That's all a mystery."

"Not usual, is it, in these parts for people to go about dropping sheep in your rooms?"

"No; but you see she was alone, and a little hard of hearing."

"Did Robinson come home that night?"

"It appears he came in, and she never heard him."

"It's an extraordinary story, certainly."

"It is an extraordinary story, sir, when you come to hear the whole of it."

"Well!"

"Well," says Jackson, "the next thing is this; the man whose house had been broken into, hearing where his meat was, goes up to Brown's house, and just as he gets there up comes Brown. Bowles, the prosecutor, says 'You've got some meat here belonging to me.' "

" 'It's up in the yard,' says Brown, 'in a shed."

Another mental note.

"Bowles goes up the yard, and just as he gets there he finds Smith and a man, who Bowles swears was Robinson, and the other prisoner, Jones, harnessing the horse and putting him to."

"Who was Jones?"

"Jones was Brown's man, that's all."

"Oh, *that's* all!"

"That's all he was, sir; and I believe he's innocent as——"

"As Brown himself. Yes?"

" 'Well,' says Bowles, 'that's my meat, and you don't take it away.' "

" 'Don't we,' says Smith. 'We'll show you.' And accordingly they jumped into the cart and away they drove, Bowles running after them and hanging on the tail-board. Now this is very important. They drove to a place where the roads diverge, and as they were going, they beat Bowles about the head and face with a great stick, and, I understand, wounded him severely. Well, they got away, and at last it appears that the man they swear was Robinson got away too, but Smith was met by a

constable driving the cart, and was taken into custody. There's no defence for him."

"I hope he is not going to plead guilty."

"Why, sir?"

"They'll make him a witness for the Crown, that's all."

"Oh, he won't plead guilty."

"What next happened?"

"What next happened is this. Up come the police and ask Brown what has become of the meat; and then Brown tells them that the owner of the meat had come, and that the three men had gone away together."

"Which was not quite true," said Alfred.

"Well, Brown thought they had gone away together."

"What! when they were beating him over the head with a stick?"

'Well, Brown couldn't see that. He thought he was trying to get into the cart behind, as some people do at times; but the police swear that Brown pointed in the wrong direction, whereas he pointed in the right direction with his thumb and finger, like this. He pointed up the road they had gone, although the road, as I said, branches off when you get a little way up. The police also say that Brown told them he hadn't let the cart, but he swears he did, and produced his book to prove it."

Another mental note.

"And then I suppose they were all taken into custody?"

"Yes."

"Then it's a dead case. I never knew a more hopeless one. How can I do anything for Brown? It's impossible!"

"You've got off many a one that has been quite as impossible as this?"

"Not quite so impossible."

"I haven't quite finished the brief," says Jackson, "I want to make a few observations——"

"Please don't—You need not trouble about observations; if a counsel wants observations he isn't worth having."

This was a true remark; for nothing is more irritating than to wade through a series of observations that are pertinent; except, perhaps the task of wading through a series that are not pertinent. If they are pertinent, they must necessarily occur to the most ordinary mind; if not pertinent, they are worse than useless, for they tend to confuse.

Now the first thought that occurs to the young advocate on reading these facts is, that no art could obtain an acquittal. This was the view of the learned Jones, but he made this remark:—"One never knows what may happen." The witnesses may waver in their evidence; they may forget something important; may try to make something that is important look more important still, or may add to their evidence. This should be carefully watched for. They may contradict themselves. The prosecution may be too eager, and overshoot their mark. They may be slovenly, and omit some important

particle of evidence. They may call witnesses not on the depositions, whose evidence has not therefore been previously sifted, or rather *shaken together by an unskillful cross-examination before the magistrate.* Look well for this; and if a witness comes up who has not been cross-examined, he will be altogether unprepared for your questions, and probably play into your hands, if you know how to examine him. In this case, it will be abundantly manifest that to call a witness without previous knowledge of all he is about to say, or may be made to say in cross-examination, is one of the most dangerous errors an advocate can commit, and may lead not only to a gross perversion of justice, but to some unpleasant observations upon the party who calls him.

The case looks desperate enough for the defending counsel; but to one with a moderately clear insight into human nature it is not hopeless. Mr. Alfred Jones had something of this insight, as was manifest when he took his seat at the Bar and glanced at the jury. He had a notion that juries if they do not get packed, require at times *a good deal of unpacking.* And, without desiring to cast the faintest glimmer of a reflection on the officials of our Courts, who do their work in the most impartial manner, I would just observe, that whenever there is an important case to be tried, it's just as well to look every juryman in the face, and see if you can discover a prejudice either against the prisoner, his trade or calling. You will ascertain also whether

there is any appearance of partiality for the prosecutor.

I know that a good many readers will wonder how you can tell this before the prosecutor puts in an appearance. My dear sir, do look at that foreman: can you not see a gleam of triumph in his face? He knows what case he is going to try. He has read all about it in the newspapers. He has condemned the man before ever the case is opened. Have him out of the box. I saw Jones look, and he challenged him without a moment's hesitation What a stir there was! How the other jurymen stared with amazement! How they wondered! The next man had a piece of blue ribbon in his coat. Now, I very much admire the principles of blue ribbonism, no matter of what nature soever; but it sometimes bespeaks an excess of rigid virtue, not at all conducive to the interests of Justice. The prisoner at the Bar is a man who drinks, and even though only an occasional glass, he will be set down in the opinion of some teetotallers (I don't say all) as capable of committing any of that terrible catalogue of crimes which one has been taught to believe was the fearful failing of the man who "has no music in his soul." The blue-ribbon man must come out of the box in this case, and accordingly is challenged. So much virtue is not sufficiently impartial for the administration of justice.

The jury again look wonderingly at one another. Whose turn will come next? Two jurors are duly sworn, and then another challenge is given. A man . .

with a very rigid face and long straight hair he is; looks as if a trial were merely a matter of form, and not an enquiry. His mouth could never smile, it is so extremely tight; and he has, as you perceive, an eager desire to grasp the Testament and be sworn. Just as he takes the book—

"Challenge!" says Jones, and the severe man looks like a tiger disappointed of his prey. Chagrined and crest-fallen, he leaves the jury box. The next *is* a smiling man; a ruddy farmer, who means to protect property against all comers. His smile informs you that he can see through a brick wall, which means any learned counsel, and find a "Werdick in spite o' these' ere counsellors, whose gift o' the gab aint to take in sich as he." He'll not see through *this* brick wall, with all his keenness of vision, and doesn't understand why he's challenged, any more than the tight-faced man, or the triumphant-faced man. The blue-ribbon man has an inkling as to why he was challenged, but puts it on a teetotally wrong ground. He thinks it was the blue-ribbon. So it was; but only as indicating an excess of virtue not commensurate with the human understanding.

Three more were sworn, and then came a momentary difficulty in the mind of the counsel. What was the meaning of those pleading eyes? They said, as plainly as eyes can speak, "Surely, Mr. Jones, you are not going to turn I out; I swear on my bible oath, I will do justice to the best of my ability." And as his ability, judging from the view, seemed

considerable, he was allowed to remain. But what about the next, a sullen-looking man, who never raised his eyes, but seemed waiting for condemnation. You artful one, James Rodger, you want to slip by the scrutinizing glance of the prisoner's counsel. Your face blushes with conscious determination that no prisoner shall escape, if your "So help me God" can help it; so you *shall not* "well and truly try," nor shall you try this case at all, for you are challenged. Out upon thee!

The rest are sworn, and the prisoners given in charge.

The case is opened clearly and well; dry, damning facts, without argument, as becomes counsel for the prosecution, are laid before the jury. All that mortal man can do for the defence in such a case is to watch, to elicit some little point, if possible, in cross-examination, "to go to the jury upon;" and to take up such points as there are in the prisoner's favor. And this is how it was done.

First witness proves the breaking in and stealing.

Time not certain, hence it was triable at Quarter Sessions. If it had taken place at a minute before nine it is triable at Sessions, if a minute after it must be at the Assizes. I mention this to point out the legal niceties and pettifogging wisdom of our mode of legal procedure.

No cross-examination.

Why? asks the reader.

My answer is, why? If the reader can think of a reason beyond that of getting out something which

may damage the prisoners, I should be glad if he will write to my publishers. If he cannot he has his answer to the question.

The cross-examination, indeed, was the shortest that could be administered, and was simply for the purpose of establishing the following points, and impressing them on the minds of the jury.

First—That the ticket in the sheep contained the name and address of the owner.

Second—That the butcher in the market to whom Brown offered the meat was *well known to him* and was a respectable man.

Third—That the said respectable butcher had often had dealings with Brown in his capacity of letting out vehicles.

No question of character, you see, but indirect suggestions leading to inferences. The prisoner knew a respectable tradesman who was probably known to some of the jury; a kind of reflected moonshine character, no doubt, and very faint; something like the dark orb in the arc of the new moon, but still visible. I might say a twilight character, indicative of a rising splendor which never appeared.

Fourth—It was in consequence of Brown's going to this respectable tradesman that the police discovered where the stolen property had been deposited.

The question eliciting this fact, I observed, was put to the detective in the following words:—

"It was from information communicated to you by the respectable butcher, and which had been

given by Brown, that you discovered where the meat was?"

"That is quite right, sir," says the very civil detective, and he was not troubled with any further questions.

It *looked*, therefore, as if there had been no concealment, at all events, on the part of Brown, *always a good point to make in a charge of receiving*.

There was, as before stated, no defence for Smith, but Jones and Robinson were admirably defended by another learned counsel, whose assistance to Alfred was by no means unimportant. He knew that Brown's defence would be endangered by any unskillful question, and *that his own clients could not possibly be benefited by it*. So he put no unskillful question, but played his cards as though he not only knew his partner's hand but his play too.

I do not pause to summarize the case, or to enquire how it would have been presented to the jury if the evidence had stopped at this point, and for this reason, that from some strange cause or other, after all the witnesses who had abundantly proved the case before the magistrates had been heard, the prosecution thought it advisable to call further evidence, which was as follows:—

A detective sergeant swore that he was present when Brown was apprehended. That he was apprehended by a German detective named *Von Buster*. That he heard this Von Buster say, "Ha! ha! Chemmy (meaning Jemmy), we are cooart you at larst—I sed we shood!" To which the prisoner re-

plied "Well Mr. Buster, *it's all for money*; *you know it's a paying game!*"

Now this, if true, was an awkward circumstance, and, coupled with the other awkward circumstances of the case, would be about as complete a coil as ever spider wove around the body of a struggling fly.

But let the student mark for his amusement, not for his instruction, the manner in which the counsel deals with this; because, if this evidence should break down Brown undoubtedly will be acquitted. The reason is obvious, but had better be stated. The prosecution show that they are doubtful of the strength of their chain although every link of it was strong enough to hold the prisoner. Not being quite certain of their handiwork they supplement it with *doubtful evidence*, and attaching *that* to the chain in a clumsy and unscientific manner, if by any chance it gives way the prisoner necessarily escapes. Let us see how it holds.

Asks the counsel: "Were you before the magistrate?"

"No," says the detective with sweet detective innocence.

"I suppose you think this evidence important?"

"Oh yes, sir, certainly."

"Was Von Buster before the magistrate?"

"He were not, sir."

"Is he here?"

"No sir."

"What brought you here?"

"A speener."

This was detective wit, but it was not clever, inasmuch as the police do not generally attend in prosecutions on subpœnas. If their evidence is material, it is their duty to give it without subpœna or extra pay. So the witty answer was in favor of the prisoner's acquittal. Wit sometimes is more than amusing, it may be useful.

"Did you make a note of the conversation which you heard?"

"No sir."

"Why not?"

"I don't know."

"You thought it important?"

"Yes."

"Did you not think it so important that it amounted to a confession of guilt?"

"I did."

The counsel does not apparently wish to *argue the matter* with the constable, because, having obtained all he wants as *facts*, he wants no policeman's *reasons* for the mere purpose of weakening them. But there are still one or two things he would like to throw some light on, so that the jury might view this evidence from his point of view and not from the policeman's. How came the detective to give evidence at all? That is the important point, and the counsel knows it to be a safe one, after the witty answer about the subpœna, so he asks:—

"When did you first make this statement to anyone?"

Most awkward, because it is clear he never gave it to the inspector on duty, otherwise he would have had to give it before the magistrates. Clear, he never gave it to the solicitor for the prosecution, for the counsel opened as much. Then *when did he first make the statement?*

"It was as this," says the detective: "I were in the 'all here in another case yesterday and meets the clerk to the solicitor for the prosecution, and he asked me if I knowed this 'ere Brown, and then I up and told him the same as I've told you."

One more question. "Did Von Buster know that you had heard this confession?"

"He did, sir."

"You may stand down."

There is nothing to be done by re-examining this witness, because he is in so many pieces that he is like Humpty-Dumpty after the catastrophe. So he stands down. It is not attempted to set him up again.

It is clear that Brown's counsel will commence his speech with this detective and the absent Von Buster, because, in breaking down this man's evidence, he will show the weakness of the other parts of the case. So he gives the jury to understand that, although Von Buster's mode of proceeding with a prisoner might do for *Germany* or *France*, it was not quite in accordance with an Englishman's notion of fair play, to which proposition the patriotic jury assented in the most unequivocal manner. They clearly entertained strong prejudices against so

un-English a mode of procedure. And, when it was pointed out to them, the fact was as plain as a hayrick, that if Brown had confessed his guilt to Von Buster, nothing would have prevented Von Buster from giving it in evidence before the magistrate. How could this look otherwise than suspicious against the prosecution?

Why was not Von Buster or the sergeant before the magistrate? And why was not Von Buster *here?* Why was no report of such a remarkable circumstance made? And why was there not so much as a memorandum of it in the detective's pocket-book? All the other evidence was weak compared to this, and weak it must have appeared to the prosecution, to have been obliged to supplement it at the last moment.

Well might the jury shake their patriotic heads in token of disapproval of this foreign mode of proceeding. It looked to them like a concocted story altogether.

So Von Buster and the detectives are well belabored with good sound invective and honest indignation, until the jury's indignation is fairly excited and in flames against the prosecution. This makes a good clear opening for the arguments that must be used to break down the rest of the evidence if that can be accomplished. Now come the improbabilities. First, the improbability that Brown knew the meat had been stolen; for, was there not the *ticket on the sheep with the name of the owner on it?* That would surely have been destroyed if the man had

had any guilty knowledge. Next, it was unlikely that Brown, if he had known the meat had been stolen, would go to the open market to sell it, and to a respectable man to whom he was well known. So far as the price was concerned, it was disposed of by the fact that the sale was forced. It had to be sold because, as he supposed, it had been taken away to avoid being pounced upon by the sheriff's officer.

The next point was that, although the respectable butcher had offered to take it at a farthing under the price at which it was offered, *Brown would not let it go*, but declared he was not to take less than six-pence a-pound; whereas, if he had known it had been stolen he would have been glad to take anything in order to get rid of it as soon as possible and avoid discovery.

That was a good telling point; it went straight to the jury, and seemed to hit the foreman on the nose, for he rubbed it with his forefinger and stared with intelligent wonder. It never struck him so before. Then he looked round at his fellow jurymen and passed the blow on.

Next came the point that, in reality, it was Brown who had given *such* information as actually led to the discovery of the meat. I say "such," advisedly, leaving the jury to take it for what it was worth—they would put their own price upon it.

Another point, not immaterial, was that Brown *had actually produced the book in which was a note*

of the letting out of the trap to the two men who committed the robbery. It is true there were no names entered, but as the learned counsel could not help that, he did not refer to it. The speech was concluded with a good, vigorous attack on the mode in which the prosecution had endeavored, at the last moment, to bolster up their case; and, with a scathing eulogy on the continental artfulness and cunning of the absent Von Buster, the counsel resumed his seat.

Then, with adroit and well-considered arguments, the learned counsel for Jones followed. Wherever Brown's counsel had delivered a blow, Jones gave a well-directed kick and sent Von Buster and his sergeant colleague reeling. He was a vigorous and courageous ally, and no doubt Brown's acquittal was due as much to his timely support as to his own counsel's skill. He was Blucher at Waterloo.

Brown declared he left the court without a stain on his character, which was true. Suspicion on suspicion, I believe, is false heraldry.

CHAPTER V.

IN ACTIONS AGAINST RAILWAY COMPANIES FOR NEGLIGENCE.

An important class of cases at Nisi Prius is the action against railway, street railway and omnibus companies for injuries caused by negligence. In general, at starting, every presumption is against the company and in favor of the plaintiff. The sympathy of the jury is on the side of the injured; negligence is almost assumed, and the making compensation appears to be a matter of simple justice and calculation. Apart from negligence at all, companies are looked upon as a kind of public exchequer, into which juries may thrust their hands and take out whatever they can lay hold of for the benefit of any claimant who can lay anything like a foundation for his demands: the foundation often being the injury, apart from any negligence whatever, and as often the negligence apart from any

proof that it occasioned the injury. As a rule, companies well understand their position, and know that the chances, if not the facts, are against them. The best evidence they can adduce is generally the testimony of interested persons, and more often than not, of those persons who have the most direct interest in shielding themselves from blame. The principal aim which companies have in resisting claims of this kind is a mitigation of damages, and with this main object in view the majority of defences are conducted. The advocate, therefore, who is most skilled in cutting down damages is the best suited to the purposes of the company. He is a destructive agent rather than a builder up of unsubstantial theories. But let it not therefore, be supposed that a real defence upon the merits is of little moment. It is of the very highest importance, and as it is generally looked upon with considerable suspicion and prejudice, is one of the most difficult to conduct.

I might give many examples from *sensation cases* which would be more interesting than the common-place one I am about to present, but I doubt if any one of them would so thoroughly answer my purpose. We do not want dazzling coruscations or models of perfection. Startling surprises are not the object of these illustrations. The simpler the facts and the more common-place the line taken the more telling the incidents are likely to be.

Two years before the present trial, the plaintiff, a working man, was traveling by the railway from

Wapping to Whitechapel. His case was simply this, that, before he had time to alight, the train started and jolted him off the step of the carriage on to the platform and injured his knee, for which injury he brought his action in the following year. The result of the trial was no result at all. The jury could not make up their minds as to whether the company was liable or not. Undecided as to whether negligence on the part of the company or negligence on the part of the plaintiff, or both; but, if both, as to whether the company could still have avoided the accident by exercise of reasonable care. The twelve special heads in mystified chaos accordingly. Some months after the case was tried again with the same result, namely, twelve special heads in mystified chaos.

To illuminate this utter darkness twelve more special heads were brought together in the jury-box, and the cause was once more tried. As I never flatter mortal man I do not wish to be supposed to say anything of a complimentary nature to the learned judge; but, in sober truth, I affirm that the manner in which his lordship kept the points of this case clearly to the front throughout the long and conflicting series of witnesses speaks well for the clearness and inflexible justice with which the trial was conducted.

I wish to impress on the reader that in the opening several microscopical points were made, which turned out to be no points, even under the strongest forensic lens. It was through no fault of the

learned counsel, but in consequence of the inadvertence of those who instructed his solicitors, that these imaginary points were beyond human vision.

First of all, it was said the trains were "*always an hour late.*" If this had been true, it would no more have accounted for the accident than it would for the motions of the heavenly bodies. If it was untrue, it threw discredit on the *alleged* cause of it, and so was in favor of the defendants. A false point always counts one for the other side. It was shown to be *untrue*. Having subsequently been corrected by the opposing counsel, it was opened that the train was *forty minutes late*. This point, therefore, twenty minutes smaller than the other.

Secondly—It was opened that the train made up *three minutes* between Whitechapel and Liverpool Street. This also turned out to be a false point, or no point, for two reasons. First, the train only travelled *a mile and a quarter in five minutes*, not a pace to indicate any extra speed or eagerness to make up time; and, secondly, a margin of something like four minutes was allowed in timing the arrivals of trains in consequence of their being obliged at times to wait outside the terminus before they could enter. But there being no obstacle on this occasion to the train running in instead of waiting outside, the three minutes were accounted for, *not made up by accelerated speed*, but by not being delayed outside the station. Thus two false points were made and disposed of, and the probability to

which they gave a possible existence was crushed before it had a breath of life. Thirdly—the plaintiff would swear, said his counsel, that he went to work seventeen weeks after the accident, but for eight weeks could only earn twenty-two shillings a week instead of thirty-five. A false point, truly, because the man had sworn on two previous trials that when he went to work, after the seventeen weeks, *he was as well as ever, and earned the same money as before.* This went very directly and forcibly to the man's credit in cross-examination, and no doubt flashed one gleam into the utter darkness. I will now take the points of the material evidence in chief, and alongside of them show the cross-examination, leaving the reader to judge of their value.

The plaintiff ceased work about half-past three and waited for a man who left his work between four and five. He lived near Shoreditch Station. He was to meet his wife at Whitechapel, and go shopping with her. He then described the accident, as opened by his counsel in accordance with his instructions. His cross-examination showed:

First—That he had been drinking that afternoon with some companions, and that, although he himself remained as sober as a judge, one of his companions got drunk as a lord, *but did not leave him.* From this fact, perhaps, the twelve special heads can gather that the contradictory evidence of the witnesses who will be called for the defendants, and who had not been drunk, will be at least as trust-

worthy as to clearness of observation of what took place on that night as that of the plaintiff and his drunken witness.

Secondly—the plaintiff, who was to meet his wife at Whitechapel, took his ticket at increased cost of fare for Shoreditch, the station beyond. This showed either reckless waste of pence, or that he forgot he was to alight at Whitechapel to meet his wife; or that the story of the appointment to meet his wife was a concocted one, invented to account for his alighting from Whitechapel when he ought to have quietly remained in the carriage.

Thirdly—his wife did not go to Whitechapel to keep her appointment.

Fourthly—His object, as he stated, in meeting his wife at Whitechapel, was to buy meat and carry it to Shoreditch, whereas he could buy it close at home for the same price and of the same quality. So there was no accounting for his getting out at Whitechapel at all; and the theory of the appointment with his wife was absurd when neither the time nor the place of meeting was agreed upon, and neither went to keep the appointment. The story had nothing to do with the cause of the accident or the merits of the plaintiff's case. But *why was a useless story told?* It was told to account for a fact which the plaintiff did not know how to account for in any other way; and you may always rely upon it that when a plaintiff or defendant gives a *false reason for any line of conduct, he is afraid of the true reason damaging his case.* In this instance,

it could only damage his case by indicating recklessness of conduct in alighting, which recklessness would seem to be the cause of the accident.

Fifthly—The plaintiff did not enquire for his wife at Whitechapel, but forgot all about her. He admitted also that he might have been under the influence of drink on the night of the accident. Before he answered the question which was put to him at the solicitor's office as to whether he was sober, he went *to the hospital, saw the nurse who had attended him on the night of the accident and asked her if he was sober*, to which she replied that he was under the influence of drink.

Then asked the learned judge—

"Why did you not give that answer before?"

"I did, my lord," said the plaintiff.

"No answered his lordship; "you wanted to attribute your condition to excitement, when it was not excitement."

False points, therefore, made by counsel; false testimony given by plaintiff, and false reasons adduced for conduct which required no reasons to be given at all. A true story is generally simple enough; a false one gives the lie to surrounding circumstances, and has to be accounted for by false reasoning and imaginary causes, and usually gets blocked by real facts which it cannot displace. Then this false story is so awkward when it has to be supported by more than one witness. The companion who was drunk swore he wasn't, and yet he was admitted to be drunk by the counsel for the

plaintiff. Another witness also declared he was not drunk. Plaintiff himself *swore he was*. Again, the plaintiff said there was *not time to get out*, that *the train started as soon as it stopped*, and yet that two persons had alighted from the same compartment, *as well as an old woman, who took a long time to get out, before he attempted to do so*.

Another important circumstance was, that he had previously sworn he took his ticket for Whitechapel (this was to fit in with the theory of meeting his wife), and now he had to swear he took it to Shoreditch. Here there was a fact capable of proof attempted to be displaced in order to fit in an imaginary fact. How, then, does the matter stand after cross-examination, according to the learned counsel for the defendant Company?

Train not an hour late, as opened; time not made up in consequence of being late; no time made up at all; train not traveling at more reckless speed than twelve miles an hour. There was time for persons to get out. Plaintiff had not to meet his wife at Whitechapel, or he would not have booked to a more distant station. Neither time nor place mentioned where he was to meet her. He did not inquire for her at Whitechapel. She did not go to Whitechapel. (Upon this point I may also state the wife gave false and absurd reasons for not going.) He had been drinking. His companion was drunk.

He had given false statements as to his earnings, and as to the time of his being incapacitated to do work full time.

But, notwithstanding all this, *how* did the accident happen? He might have been drunk, but still the Company had no right to injure him. He might be a false witness, but yet he had met with an accident, and if it arose from the Company's negligence he was entitled to compensation.

In a defence of this kind you have not to show how the accident happened. That is for the plaintiff. You have only to prove there was no negligence on the part of the Company. If you can show negligence in the plaintiff, well; and in suggesting this negligence as the probable cause of the accident, all the points made were good, because they gave rise to probabilities; nevertheless these, although good, were not conclusive. There was the fact of the accident and the *probable cause of it given by the plaintiff*, who, although untrustworthy in many particulars, was not utterly unbelievable as to this. Suggestions, therefore, on the part of the Company will not wipe out this direct evidence; but a good suggestion as to the probable cause of the accident was made, *based upon an answer to a question in cross-examination.* The plaintiff stated that he knew some trains did not proceed further than Whitechapel, and the suggestion was that he hurriedly jumped out for the purpose of catching another train, and, in so doing, fell.

I do not think there were any facts up to that time on which the suggestion could be based, beyond the plaintiff's knowledge that passengers sometimes have to change; the suggestion, there-

fore, was not evidence, and did not induce the jury to stop the case, so witnesses were called, who proved that the plaintiff and his companions were not sober in their language and conduct while in the carriage; and that, after the accident, the plaintiff had stated that he thought they had to change carriages. I need not say there was abundant evidence to prove a total absence of negligence on the part of the defendants; but it took a great many witnesses and a long time to do it, and it took the jury a couple of hours to consider their verdict. At last, however, the thrice-told tale was brought to a conclusion by a finding in favor of the defendant Company.

Juries, truly, are an incomprehensible body. I do not think the direct evidence on the part of the Company would have been sufficient to lead them to the conclusion they arrived at, because it simply went to show that the train stopped long enough to allow passengers to alight; that the doors were shut properly, and that the guards did their duty. All this would have looked like mere evidence of course, on the part of the Company, and was, as usual, of such a character that, if accurate, there could have been no accident at all. When a man has lost a leg or an arm it is useless to attempt to prove that it was the result of a miracle. Miracles are so rare now-a-days that they are never believed in a Court of Justice. Over-swearing is worse than not swearing up to the mark. What you have to look for in the plaintiff's case are false points, false arguments,

absurd reasons for reasonable conduct, exaggerations, perversions of simple facts, unnatural theories, improbable motives and contradictions. All these were found in abundance in this case, and the wonder was that the jury should have taken any time to consider their verdict. It only proves how difficult it is for the most experienced counsel to overcome the prejudice and benevolence that at times find their way into the jury-box.

CHAPTER VI.

IN ACTIONS AGAINST STREET RAILWAY COMPANIES.

My next illustration is an action against a street railway company for damages in consequence of the defendants' negligence. It differs greatly in the mode in which the defendants conducted their case from the last, although the circumstances attending the accident were similar, and the alleged negligence precisely of the same character.

The reader will smile when I say that in conducting a defence much will depend upon the line you take.

"Of course it will," he exclaims, contemptuously; but I want to point out, my dear and impetuous friend, how the true and the false lines run so nearly parallel that it requires careful study *and* knowledge of human nature to distinguish them. I am dealing in these cases for the most part with *leaders*, not with inexperienced juniors; and, if

leaders with all their practice, fail sometimes to discern the left hand from the right, it shows how carefully advocacy should be studied, and how useful models may become, whether they are models of beauty or deformity. Have patience with me, therefore, when I say that much depends upon the line you take.

In the present case a middle-aged lady, whose husband was a builder, and carried on his business at Scarborough, was on a visit in London. Going out one morning to "do a little shopping" she hailed a street-car, which was just in the act of starting. The conductor stopped the car, and the lady, a portly person, was just in the act of getting on to the platform when on it started, and as the lady had one foot on the step and the other on the ground, her footing was somewhat unstable, and down she went on her back with considerable violence. She was picked up and taken to a doctor, where she fainted, was taken to her lodgings, and remained there several weeks under medical treatment. She then returned to her home, and, after some time, becoming worse, called in a local doctor. That gentleman at once perceived that a rib was fractured, and immediately reported the fact to the manager of the Company, who some time after communicated the report to the medical adviser. That gentleman, however, pooh-poohed the idea of a broken rib without further examination, although the local doctor's letter had stated that if the Company's doctor would come down he could not only ascertain from the

ordinary examination that the rib was fractured, but could distinctly hear that it was broken when the patient breathed. But the Company's doctor, satisfied with his previous examination, was prepared without further enquiry, to swear that if a rib had been broken *he must have discovered it*. One or two other doctors would also give evidence that it *was impossible for a rib to be broken, and not discovered on examination*. The reader will bear this in mind, for it will become important on the motion for a new trial.

One further statement there was in the local medical gentleman's letter to this effect, that "he reported the fact of the broken rib to the Company *in order that they might send some one* at once, so that it could not be alleged hereafter that it was a hole and corner examination."

What a straw this was for counsel to catch at will be seen in the course of the trial. That counsel should clutch at it I am not surprised, because a straw sometimes in a Court of Justice, if adroitly exhibited, will look as substantial as a floating spar; but how any human being could believe it to be a lifeboat passes the comprehension of my unimaginative mind.

The question in the case was simple enough—*Did the car start before the plaintiff had time to enter?*

The cross-examination of the plaintiff and her witnesses will be amusing. It was clever but unscruplous; ingenious but unmerciful. It was clearly not based on any profound knowledge of human

nature, for the human nature in the jury-box resisted and resented it.

"Did you not once keep a greengrocer's shop?" the plaintiff is asked.

The question certainly seems a long way from the issue; but, I suppose, being admissible, it went to show that a greengrocer's rib is not quite so valuable as the rib of a builder's wife. It means something you may be sure.

The answer was "Never."

The foundation on which this question was based was this; There had at one time been a front-room occupied as a greengrocer's shop on the premises where the plaintiff resided. But even if the plaintiff did keep a greengrocer's shop, it had little to do with the question as to whether there had been negligence on the part of the Company in starting the car before the plaintiff, greengrocer or no greengrocer, had time to get in it. Nor do I perceive how keeping a greengrocer's shop went to the credit of the witness.

The next question was whether her husband *had mortgaged his houses?*

Answer: "I don't know."

"But you keep the books?"

"I keep the books."

"And your husband has claimed damages for the loss of your services in keeping the books?

"I don't know."

"What *do* you do?"

"I let his houses and keep his rent-books."

"Has he got any houses?"

"Yes."

"Has he not applied for donations to a friendly society because he was hard up?

"I don't know."

"Will you swear that?"

"Will I swear what?"

Counsel hardly knew how to answer—*he* was being cross-examined now.

So, not making anything of the greengrocer's shop, and nothing of the mortgages, the learned counsel "tackled" her upon the accident, and strove to make out that she ran a considerable distance after the car, and endeavored to enter it while in motion; a futile endeavor, certainly, seeing that this middle-aged lady had hailed the car while she was *about a hundred yards behind*, and would have had to travel at the rate of about twenty miles an hour for an hour and-a-quarter before ever she could overtake it. This was a glaring improbability set up by the defendant Company.

The jury wagged their heads and smiled.

No doubt it is possible in a circus for a clever equestrian to vault on to the back of a horse while the animal is going at full speed; but it is different in the case of a street-car, and a lady cannot vault into it while it is going at a velocity of eight or nine miles an hour, especially if she is a couple of hundred yards behind, and only progressing at the rate of two miles an hour.

So the cross-examination, admirable as it was,

failed. And let this be remembered by aspiring students; when you fail in cross-examination you are in a worse condition than you were before you began. There was a similar cross-examination administered to the other witnesses, every question irrevelant to the issue, but going directly *to the credit* of the witnesses.

Next came the important witness in the case with regard to the injuries, namely, the local medical man. In private life you would scarcely venture to express a doubt as to the veracity of a gentleman, and you might innocently imagine that even upon his oath there would be some recognition of his desire to tell the truth—at all events, some respect for his professional reputation.

The doctor gives his evidence fairly enough; states how he was called in, examined the woman, and discovered the broken rib, evidenced by *crepidus*; how that he immediately wrote the report; that he continued to attend the patient, for which attendance he had charged a moderate sum, not enough one would have thought to bribe him to commit wilful perjury, and so run the risk of penal servitude.

One would also have thought that if the Company had doubted this gentleman's word when he sent the report, they would have taken some means to test its truth. They could easily have sent down their medical officer to ascertain whether there was a broken rib and *crepidus* or not; and if there had not been, the resident medical gentleman would have

been nicely caught. But they preferred to meet his statement by mud, a bad argument at all times, unless you are lodging a complaint against the vestry as to the state of the roads.

Now let me ask the student to consider what there was to cross-examine this witness about *in the absence of any evidence to contradict his statement.* There was really nothing, except as to the nature of the inquiries with a view to minimise the damages. A judicious question or two as to the nature of the injury, and the mode of treatment to which the lady had previously been subjected by *the first doctor she* had called in, was all that true advocacy could have warranted. Instead of this, the Company instructed their counsel to ask these questions;—

"Will you swear the rib was broken?" As if the doctor, having sworn that it was, would now swear to the contrary because the learned counsel invited him to do so. It is so like asking a witness, "Will you swear you have not committed perjury in your last answer?"—with a view to prosecute him either for the first statement or the second. This is an almost exploded style of cross-examination. I do not say that an extremely effective question, similar to this, may not sometimes be put, but *it can never be asked to contradict a hard fact which a witness has made up his mind to swear to.* Try as you may, you cannot get him to put his foot upon his own neck. The question may be usefully asked when a witness has given a *careless* answer or an *inconsidered* answer, damaging to the cross-examin-

ing counsel, and the witness is reminded by the form of the question that he is on his oath. This goes to the *certainty* of the witness, and not to his credit. You may rely upon it that when a witness speaks from knowledge and with certainty, no amount of "Will you swear to that, sir," will induce him to contradict his former answer.

I come now to the next question which the learned counsel was instructed to ask of this medical gentleman, and it was this:—

"*You have been in trouble, haven't you?*"

"In trouble!" exclaims the astonished witness.

"Yes, in trouble. You know what I mean?"

"Indeed, I don't," says the witness.

"Oh, oh, do you swear that? weren't you charged with assaulting a girl?"

The witness' hands fall upon the ledge of the witness-box; every eye is fixed upon him; he turns pale and red, and a strong emotion absolutely shakes his frame as he answers:

"I was; most unjustly."

"Oh, of course," says the counsel resuming his seat.

Not long, however, was the learned gentleman's triumph; a question in re-examination elicits the fact that, ten years ago, a girl, for the purpose of obtaining money, had made a false charge, which had been thoroughly investigated and disproved; that public sympathy had been on the side of the accused; that he had retained, ever since, his position, appointments, and practice, and was respected

by all who had the best means of knowing his character.

Let me ask for what reason was this question put? It had nothing to do with the merits of the case; the Company had never met his evidence, or attempted to investigate the truth of his statement made in writing months before. It could not go to the credit of the plaintiff, who had been seriously hurt, and whose injuries could not be disputed, except the fracture of the rib, and that only by attributing perjury to the doctor.

On what principle, then, was the question asked? Was it to torture the witness? What effect could it have on the verdict? We will see by-and-by what its effect on the verdict was. I say nothing of its influence on the judge. Sometimes a breath of suspicion will tarnish the fairest life. A falling away from virtue is to some minds intolerable, but advocates must take human nature as it is; and as it is, it will generally be found in the jury-box. Look well then to your jury, and turn such an onslaught as this in favor of your client; and rely upon it as a sure maxim in advocacy, that for every unjust attack upon private character the *jury will give damages if damages are possible.*

In this case damages *were* possible. There was really no defence to the action. Every fact and every probability were in favor of the plaintiff, and the jury gave a verdict for £150;—injury, I presume, £50, £100 for the mud.

Of course, there was the usual application for a

new trial. You may sometimes worry a successful plaintiff out of a verdict when you cannot reverse it. Companies are seldom content with one trial when they lose. So the modest application for a new trial was made on the ground that the verdict was against the weight of evidence.

"I suppose the case was properly placed before the jury," said one of their lordships.

"Oh, yes, my lord," replied the counsel for the plaintiff.

"And the witnesses cross-examined?"

"Oh yes, my lord; their whole lives laid bare with the utmost fidelity. The doctor was even asked if he had not been charged with rape—a most scathing cross-examination, my lord; the witnesses were fairly riddled."

"You mean puzzled?" said one of their lordships.

"You mean shot through and through?" said another of their lordships.

"Yes, my lords," answered the counsel.

"I thought so," said both the learned judges, simultaneously.

"I am sure, my lords," continued the learned counsel, who was "showing cause," "the defendants cannot complain on the score of cross-examination that everything was not done for them that was possible. The poor doctor was completely heart-broken. The false charge raked up against him was at least ten or twelve years old."

"And did that fail to obtain a verdict for the defendants?"

"Oh yes, my lord, the facts were so strong that I believe murder itself would have been useless. The defendants were bound to admit that the plaintiff had been injured, but the question was whether the doctor who subsequently attended her had been guilty of some offense years before."

"How could that effect the case?"

The learned counsel did not see how, although he and every one else knew in what way it affected the verdict. But how could the learned counsel for the defendants urge *that* in mitigation of damages. I have, however, known even defendant's misconduct urged as a plea in that behalf. So strange an art is advocacy; so unblushing in its pretensions, so artful in its manœuvres, so sublime in its contempt for suffering.

Unhappy doctor thou hast no instrument which can give a pang like thine!

In dismissing the application for a new trial, one of the learned judges uttered the following pithy sentences, which deserve to be printed in letters of gold and placed over the door of every Court of Justice in the kingdom:—

"I have always set my face against turning the witness-box into a pillory, and I always shall set my face against it as long as I sit on the Bench. If witnesses who come to give evidence, often against their will, are to have their whole life laid bare by cross-examination, and every unhappy failing or misfortune of their early days raked up for the purpose of throwing discredit, as it is called, upon their

testimony, it is a form of torture that no one will voluntarily submit to, and the cause of justice will suffer. No one will come forward to give evidence, for no one will be safe. Few persons could stand an examination into the whole of the incidents and errors of their past lives. Witnesses should be protected in the performance of a public duty, and matters which do not directly affect their credibility should not be dragged forth to the public gaze. I repeat it, you have no right to turn the witness-box into a pillory."

So the verdict stood. It is never wise to cast your ship away when, by throwing something overboard, you may bring her into port. There is often more art in losing a case than in winning one. If your horse runs away don't throw the reins on his neck. You cannot meet a fact by theory. Not long ago an expert in handwriting declared that a certain writing was a forgery. He was asked what he would say if the man who wrote it came into the box and swore it. His answer was he would not believe him. Asked, if witnesses came who saw him write it, what he would say he answered, "If a hundred persons swore they saw him write it I would not believe them, because *there are indications in the handwriting which clearly show that it could not have been written by the man whose writing it purported to be.* The expert was told to stand down. Experts in art have given similar evidence.

Counsel should always be on their guard against

experts, the most dangerous class of witnesses you can meet. They do not swear to facts, but to *opinions*, and their opinions are to them what facts are to ordinary men.

In this case the argument that a rib cannot be broken without the fact being discovered by a medical man was singularly unfortunate, since the tribunal could contradict it *from its own experience*.

CHAPTER VII.

IN ACTIONS AGAINST DIRECTORS OF CORPORATIONS.

It has been suggested during the progress of this book, that it might give instances of advocacy from the State trials. I cannot, however, perceive that any good would result from it. State trials are not necessarily great trials, any more than great lawyers are always great advocates. Neither is it to exceptional advocacy that I desire to direct the reader's attention. Everyone has not to defend a royal personage or a covey of bishops, and I would much rather show, if possible, how to defend a common action or a thief.

Besides, it is easy enough to be heroic when the great occasion comes; the difficulty is to be commonplace. Everybody likes to do some great thing; the "waters of Israel," however, are good enough for me. The real test of capacity is in the performance of the minor and unapplauded duties of life.

It is the everyday work of the profession that I am illustrating. The great feats of advocacy illustrate themselves, and after all are not different in kind, but only in prominence and splendor from the simplest work. Big cases are no bigger than little ones. Let the cause or the charge be what it may, you must follow on the same lines and employ the same art. The point of sight is the same in a small picture as in a large one, and the rules of perspective must be obeyed in the one as in the other. You would defend a master and his slave, a prince and a beggar, by the same rules. Treason is not dignified because a noble-man is charged with it, nor advocacy consecrated because a bishop is the subject of it. So that State trials are no better as illustrations than sessions trials. What I chiefly want to find are *blunders*; beauties will discover themselves without being sought.

Let me take a specimen from one of the modern masters. It is a simple, common-place case enough, but requires skill in management; especially it needs a clear and well-limned design in its opening. I scarcely think it can be one if it be not well opened, and I hardly think it can be lost if the opening be clear. The speech, therefore, has art in its construction and symmetry in its proportions. Much needed here is the advocate's skill in management, for on the other side is an array of counsel by no means to be treated lightly. They are at least three to one against the plaintiff; for, as it appears, several gentleman of position are charged

with fraud. It is said they have issued a false prospectus for the purpose of inducing the public (and among them the plaintiff) to subscribe for shares in a certain commercial company. The social position of the defendants, therefore, is an important element.

Now, several things have to be established before a verdict for the plaintiff can be found, and in order to understand the outline which I shall give of the opening speech, it is proper to state what the points are that will have to be found by the jury to entitle the plaintiff to a verdict.

First. It must be proved that the defendants were *responsible for the contents of the prospectus.*

Second. That the statements contained in the prospectus were *false.*

Third. That they were false *to the knowledge of the defendants,* or, at all events, that they were made in *reckless ignorance of the facts.*

Fourth. That the plaintiff took his shares, *believing the statement to be true.*

Now, simple as this case is, it is difficult; there is much to be established. The facts must be clear, and, if I mistake not, the opening speech must be clear too; it must be so arranged that there must stand out before the jury *the position of the defendants,* their *relation to each other,* their *connection with the Company,* the *nature of the article* which the Company was formed to deal in, the *knowledge of the several defendants as to the contents of the prospectus,* the *position of the plaintiff,* and the *mode*

in which he was induced to take the shares. If all this be well done, there will appear before the jury something with a well defined outline, and they will be able to watch the details of the evidence as they fit themselves into and complete the design.

Let us listen to the advocate. He makes a good start, because he calls the attention of the jury to "*human gullibility*." That's the groundwork on which all fraudulent companies work. So it is put in *the forepart of the opening*, and it tells well, as you can see by the pleasant smile that passes over the faces of the jury. Their attention is at once fixed. There will be something amusing in this "human gullibility," and a new feature of it will, in all probability, be brought to light. Human gullibility is always interesting, from the gypsy fortune-teller's vulgar imposition to the spiritualistic revelations of the other world, which captivate the enthusiastic believers in the impossible.

We have now an extremely short statement, as to who the *plaintiff* was, and are told that he brought his action against the defendants *for fraudulent misrepresentations, whereby he was induced to take shares in a company called the "Chocolate Sawdust Company."*

That's a good mode of telling in a few words what the jury have to try. So to speak, it was "the plain English of it," and that is what the jury like. It occupies the foreground in the speech, and throughout the trial will be always present in their minds. As we listen with intense interest we won-

der what will come next. We have a first-rate advocate to tell us, and, therefore, had better listen. He will be sure to give some important fact the place of honor, and here it is:

The failure of the Company in which the plaintiff was induced to take his shares. The Company, it appears, had gone into liquidation after the plaintiff had taken his shares, and he was then required to pay calls upon a hundred one pound shares, he having only paid the money upon allotment.

You can see the bird hopping into the trap as plainly as possible if this statement be correct.

Next comes a description of every one of the defendants. This was necessary in order to the complete understanding by the jury of *the persons with whom the plaintiff had to deal.* If they are shown to be men used to the business of getting up companies, to the inner workings of the board-room, and to the intellectual business of prospectus drafting; if they are shown to be sharp, shrewd, clever men of the world, with a thorough knowledge of human gullibility, you may depend upon it this case will be more than half won by the opening. All this, therefore, was shown most clearly by the description of the defendants and their several occupations *as early as possible in the speech for the plaintiff.* The jury are making notes you see *before* a word of evidence is given. They are noting human gullibility. So far, then, all is clear and straightforward. The case is unfolding as nicely as possible, without any exaggeration of language or facts.

There are already some good strong inferences and a fair amount of prejudice; the way, therefore, is prepared for the *history of the transaction*, which now in its natural order comes and unfolds itself as follows:—

In 18—, one of the defendants, Hookey, who was an engineer, took out a patent for obtaining a particular product from the seeds and fruit of a certain vegetable. Hookey in fact was a trustee for himself and the other defendants.

The next step was to sell the patent rights to a gentleman named Albert Montague Strawman, the the son of one of the defendants, in consideration of one penny per pound royalty on articles of food or beverage which might be sold under the aforesaid patent, and £20,000 in cash or shares fully paid-up in a company which was to be started by the said Albert Montague Strawman, to be called the "Chocolate Sawdust Company, Limited."

The Company was to be started with a nominal capital of £50,000 in £5 shares, and was to have the option of purchasing the royalty for £30,000.

Now let us pause a moment and survey the road we have travelled. At this point will not the jury ask themselves how it came to pass that the son of one of the defendants was to be so highly favored? why his father was to present him with so valuable a gift? what he had done to deserve it? and why the parent should not have kept it himself? with various other questions not unimportant at this stage of the enquiry.

Next comes the story of the prospectus. Strawman being chairman of the Company, and Romney the solicitor, they drew out this important document: "And it was part of their scheme" the jury were told "that the shares should not be put into the market, but be chiefly held by these defendants." Out of 6,800 shares which were allotted, 6,400 were appropriated by the defendants. Then we are told that "flaming announcements were published in the newspapers describing the merits of this wonderful product. It was to possess seven distinct advantages over ordinary chocolate, the distinct advantages being conferred by the sawdust.

The next step was, that under the powers of this Company, as set out in the prospectus, subsidiary Companies were to be formed for the purpose of buying at extravagant prices the right to use the patent in foreign countries. Among them was the French Chocolate Sawdust Company.

Then comes the inducement held out to the plaintiff which caused him to embark in the magnificent scheme, the inducement being contained in the prospectus, which was now read the first time.

Great success it appeared from the document had attended the Company in England, and that being so, the directors felt themselves justified in stating their confident belief that the profits would pay dividends of at least 50 per cent. on the nominal capital, and would exceed those of the English Company, which Company had entered into a con-

tract that would yield a return by way of annual dividend of a sum equal to the whole paid-up capital of £34,000.

A truly magnificent project, proving the truth of Solomon's words that "*man findeth out the knowledge of witty inventions.*" One had need to understand the words of the wise and their dark sayings "before embarking in so unprecedented an enterprise."

The case being thus far simply stated would appear to be almost proved, and in reality the jury think so if you can form any opinion from their countenances. It will take some getting over, that statement, because no one will believe that three intelligent business men like the defendants would really cast so much "bread upon the waters" with the hope of finding it after any number of days.

Now comes the learned counsel's bold assertion that there was no justification for this statement; and he says further, that the only means by which the English Company made any profit at all was by the sale of the patent rights to the French and other Companies. That they obtained £50,000 by these means, and a further sum of £30,000, which was by capitalization of the royalty. These sums the defendants it appeared put into their pockets, although the wonder is that being such public benefactors they did not put them into the pockets of other people.

But the defendants did so far take the public into

their confidence as to sell their own shares, which at one time had been quoted as high as £50 premium, when only £1 per share had been paid.

Then said the learned counsel, "after *this great success the parent Company went into liquidation*" the success it had reached was due to swindling, and that the whole of the profits had found their way into the pockets of the defendants.

There is in this opening, of which I only give the form, a model for any advocate to study. Fifty counsel might have opened the case in fifty different ways, but not one would have been so effective.

First. The claim.

Secondly. The failure of the Company after the plaintiff had taken his shares.

Thirdly. The position of the defendants, and their character as deduced therefrom, with all the probabilities arising from their intimate knowledge of the workings of companies, and their knowledge of "human gullibility."

Fourthly. The history of the undertaking, with all its paternal and filial reciprocities.

Fifthly. The magnificent prospectus with *its* probabilities, that is to say, its absurdly exaggerated advantages calculated to deceive only rapacious gullible fools.

Sixthly. The $80,000 in the pockets of the defendants, which was not a bad egg for a dead goose to lay.

Now, I would like to ask what powers of advocacy could overcome such a set of facts as these?

Turn them, twist them as you will, there they are, and, like a glass prism, they present the same surfaces, but throw different colored rays at every movement.

There is only one way for skilled advocacy to to meet these facts, although the unskilled would doubtless find many. The one way is not to dispute the facts, but to attack the probabilities. If you have carefully followed the incidents of the case you will have seen that it is not the facts so much that the learned advocate has made his case of, but the *probabilities arising therefrom.* For instance, it might be quite possible for one defendant to sell to the son of another defendant a valuable right for a trifling sum. But what is the probability?

So, if you take the prospectus, it might be a wicked fiction from beginning to end, and yet the defendants might have been themselves imposed upon by some one more clever than themselves.

But what are the probabilities?

So that, after all, probabilities are the very strength or the weakness of facts; sometimes they will destroy the evidence of facts altogether. State a fact with an improbability, and you will be liable to disbelief. But, then, suppose a man, known to be a man of high character, states an improbable fact, what then?

I answer, *the probability is that it is true.*

But when a trustworthy witness has stated a fact, although he has only stated it to the best of his be-

lief, *with a probability* it will take a great deal of swearing to get over it.

Say you prove that a house caught fire in three different rooms at the same time, although you have not a particle of evidence beyond that fact, yet the probability of its being the work of an incendiary will be so strong as to be irresistible; and though fifty witnesses were to swear to a series of facts with a view to account for the origin of the fire in opposition to that probability, it would not have the least effect even on "human gullibility."

Probabilities, therefore, are the mainstay, of evidence, are, in fact, *the* evidence; and I will endeavor to show, by-and-by, how almost entirely Cicero builds his defences upon them. In the present case the advocates for the defendants knew well enough what they were about, and so they opposed evidence *to the probabilities*. The descendants swore they were not conscious of any mis-statement in the prospectus.

One learned counsel said "It has been asserted that in a contract which was entered into between my client and one of the witnesses for the plaintiff, he, the witness, had been befooled, and that my client is a swindler. "But," said he, "there is not a tittle of evidence to support such statements." This pretty well I think proves my proposition as to probabilities.

Another of the defendant's counsel said that to establish fraud against his client, who was the solici-

tor to the Company, it must be shown that he acted not merely as a solicitor, but *as an individual*, and he submitted it would be very difficult for the jury to come to any such conclusion. Difficult no doubt to make a solicitor out of nothing, or to make him an abstraction; but not difficult surely to believe that what the solicitor knew the individual knew also. Even if a solicitor be two persons, you can scarcely believe that one of them can act without the other's knowledge. So that subtle reasoning fails, as fail must all attempts to separate a man from himself, or to make two men out of one. The defences failed, not because they wanted ability and ingenuity, but because *they lacked that probability which was so strong on the other side.* Men have not even yet succeeded in gathering "grapes of thorns, or figs of thistles;" horticulture has not attained that pitch of perfection at present. When it does you may probably make very good chocolate out of sawdust.

I will add, with reference to this case, that I am expressing no opinion of the character of the defendants, or the nature of their transactions. I have simply dealt with the statements and the conduct of the case from the advocate's point of view, and made such reflections as have occurred to me, not with the wish to enter into the merits of the case or to express an opinion upon it, but how from its management the jury were driven to the conclusion they arrived at. It is not the merits of the case, but those of the advocate that I am concerned in

pointing out, and I have done so without the remotest intention of casting an imputation on any one concerned in the cause. I know nothing of the parties, the cause, or the chocolate.

CHAPTER VIII.

IN ACTIONS AGAINST INSURANCE COMPANIES.

This case will illustrate the fallibility of human judgment, when formed before the facts are fully known; the difficulty which sometimes arises in advocating a righteous cause, as well as the effects of prejudice upon the progress of a case.

The action was brought by a mechanic against a Fire Insurance Company for £100, upon a policy of insurance for tools and furniture which had been destroyed by fire.

There was no policy of insurance and never had been; so the pleader's art was manifested in alleging first that *there was a policy*, and in the alternative of there being none, then that there was *an agreement to grant a policy*. It also turned out there was no agreement even, so the pleader's art was rendered still more conspicuous. The learned counsel for the plaintiff commenced his opening speech

by alleging that the Company was a miserable wretched Company, a family party who traded on the poor, and who, after taking the premiums for insuring, failed to perform their contract. And this statement, which was all untrue, caused the clever jury to see through the case at once before ever a fact in support of a single statement was deposed to, and every juryman became a prejudiced and unscrupulous advocate for the plaintiff. They were a special jury, and wagged and shook their special heads, as every epithet and insinuation were hurled at the devoted and maligned Company. I verily believe that if they had been asked for a verdict before the counsel for the plaintiff had sat down, they would have given it. They did in fact propose to give it before the counsel for the defendant Company had been heard; and sent up to the judge what they considered a verdict for the plaintiff. His lordship, however, told them that the Company was *entitled to be heard*, or there would undoubtedly be a new trial.

The special heads therefore wagged, and learned one lesson, namely, that both sides in a cause must be heard before verdict can be returned. The facts of the case were as follows: —

An agent of the Company had asked the plaintiff to insure. Plaintiff was already insured in another office, but said *he was not*. A proposal form was shown and *read over to him*, and a printed receipt form was *read over to him* which stated in the plainest language that the risk was *not covered until*

the proposal was accepted by the Company and the policy or notice of acceptance was sent to him. Five shillings was paid on account of deposit, *to be returned if the proposal were not accepted.* This was on the 4th February. The proposal was sent to the manager of the Company on the 8th. On the 14th of the same month two events occurred; the premises were burned down, and the Board of Directors refused to entertain the proposal. It was *clearly established that at the time they did so they had never heard of the fire.* But before this was proved the learned judge observed that if the fire had not occurred on that day, *could anyone doubt that the proposal would have been accepted?*

Here the special heads wagged with conscious wisdom and delightful expectation. Following my lord's leading, the whole bands of fiddlers struck up with a vehemence that startled Justice from her propriety, little dreaming that the plaintiff could not by any possibility dance to such a tune, and not perceiving that *if the directors of the defendant Company had known of the fire, and had refused to accept the proposal for insurance on that ground alone, they would have had a perfect right to do so*, all the fiddlers in creation to the contrary notwithstanding. Again, had the jury been less prejudicial and less inclined to punish the Company for the untrue accusations of the learned counsel, they would have reflected that as a matter of fairness his lordship would never have made the observation if the verdict could have been based upon it. Therefore the jury

began by being unjust, and ended in being foolish. They are sometimes so clever and absurd. Whenever you get such a jury as this you had better let them make themselves as ridiculous as possible, and show that they are unfit for the post they occupy — their verdict then must be abortive. After abusing the defendants the counsel undertook to prove conclusively that the receipt of the five shillings *covered all risk from that date*, a great and impossible task truly, with all the documentary evidence dead to the contrary.

A dry, hard fact needs no hammering. It resists argument, and stares you in the face, notwithstanding the most violent protestations that it has no existence. But when a jury is determined to ignore facts, as I am glad to say they very seldom are, you may quietly ignore *them*, for facts will outlive the jury. Again, an alleged fact which wants so much "conclusive proving" is seldom conclusively proved at all. It melts away generally like a snowflake that you examine in the palm of your hand. And in this case I thought the learned counsel did protest too much. He alleged facts too big for proof; he denounced the defendants and left his denunciations as the only evidence against them; he insinuated motives without showing a possible basis on which they could rest. He *said* the five shillings was to cover all risk, and the twelve special heads nodded as though they had been present at the payment thereof, and as if witnesses could never lie. So that point was established to their satisfaction.

Next, said the learned counsel, *the proposal was actually accepted by the Board*. That also was taken as proved by the jury. Next it was affirmed *that the policy was actually made out*. Here the fiddlers struck up again, as though some great good fortune had befallen them. Next, it was said the directors all heard of the fire *after the* acceptance of the proposal, and then met and destroyed the proposal. This looked something like infamous conduct, but it lacked one essential element to make it evidence, that is, *proof* Then it was said the man would be called who received the accepted proposal from the Board *and made out the policy* upon it.

So that altogether a marvelously good case was opened. No link was missing, and nothing but the evidence in support of it wanting. But unfortunately, the only so-called proof of all this was the oath of the plaintiff as to the statement made by the agent; a question on the proposal form asking *the agent whether he had covered the present risk or not:* the *calling* a quondam servant of the Company who had been dismissed for not handing over a premium paid to him, and another discharged servant who had been the victim of a similar accusation. But *neither of the discharged servants swore up to the mark*, or up to any mark whatever. Their evidence only went to show their own malignancy against their late employers.

The jury one after the other in rapid succession put questions to the witnesses and questions to the judge, and even addressed arguments to his lord-

ship with a view of showing that the defendants were liable. Never was there such a battle in a Court of Justice.

The jury practiced file firing and volley firing with the most untiring perseverance, evidently with the object of establishing a claim which had neither foundation in law or in fact. Why did these twelve heads wish the plaintiff to win? Not because he had a ground of action, but because the Company had been abused, the man had paid five shillings, and his things bad been burned.

In cross-examination it was shown first that all the vilification of the Company was groundless; there had never been but one resistance to claim before this during the Company's existence; tens of thousands of policies had been granted and thousands of claims paid. In fact the Company stood about as high as any Company could stand, and the learned counsel, who had opened with so much acrimony, had to *publicly withdraw all he had said against the Company.* This was a good effective starting point. If you once get a nice piece of high level ground to stand upon, you can command a pretty good view of the situation.

Judge sees at once it is not a "wretched, miserable Company" or a "family party," but a *bona fide* respectable body of gentleman, and we hear no more of attempts to win the case by abusing them. Vituperation in fact turns out to be forensic eloquence, that is all.

Still, the jury are benevolent-hearted gentlemen,

and, like a good many other persons outside the jury-box, they feel disposed to act generously by putting their hands into other people's pockets instead of their own, a principle which honest men who are not so benevolent set their faces against. Charity may cover a multitude of sins, but I never heard that dishonesty was one of them; *that*, when it obtains its deserts, is usually covered by a less attractive garment. The next point established was, that the opening speech was ever so much larger than the evidence in every particular, one of the greatest mistakes a counsel can make. The plaintiff did *not* prove, as he undertook to do, that the policy was issued, but *that it was not*, and in this he was *corroborated by the two discharged servants*. The point remaining, therefore, was, as to whether the agent had made the alleged verbal bargain, and it was upon this point that the sagacious jury made up their twelve several minds that he had.

But the judge was of opinion that even if that were so, there was still left the question as to *whether the agent had authority to make it*.

Then the jury became illumined by a ray of bright intelligence, not their own, but the judge's, and suggested that it was really altogether more a matter for the judge than for them.

To this the defendant's counsel cheerfully assented, and the plaintiff's counsel being also agreeable, the whole matter was left to be decided by the learned judge, and the jury were dismissed.

Now, let it be observed that this jury broke down

through their wrongheadedness. The very surrender of the case was only in keeping with their previous conduct. If they could have returned their verdict for the plaintiff without hearing the defendant's counsel they would have done so. It was the refusal of this generous offer that led to the final rupture. Seeing that they would have to spend the next day in the jury-box, they resigned their functions to his lordship. Constantly baffled in their desire to put something into the plaintiff's pocket, they gave up in despair.

This is the greatest instance I have known of prejudice and wrongheadedness in the jury-box, although I have seen many specimens in various degrees.

Having got Benevolence and Stupidity out of the jury-box, there does now seem a chance for Law and Justice. His lordship's opinion has been materially changed from what it was before he heard the evidence, and his mind is open to be convinced by arguments on the one side and the other. It is clear, too, that whatever the result, his lordship is glad to be rid of that special twelve-headed prejudice which would not permit so much as a fair trial, or, indeed, a trial at all before verdict.

At the sitting of the court the learned judge announces that his opinion is in favor of the defendants upon the question as to whether the agent of the Insurance Company had authority to make the verbal bargain which the plaintiff swore he did, which verbal bargain the reader will remember was

that if the plaintiff paid five shillings, the insurance was to commence from that day. The judge thought he had no authority to make such a bargain. But his lordship was of opinion that the agent did in fact make that bargain, whether he had authority to do so or not. Here, then, the reader will perceive, was a case in which the evidence had all been given, and the effect upon his lordship's experienced mind was adverse to the defendants. If argument can change the judge's opinion, it will be something in favor of advocacy. If it cannot, it will show either that the facts are too conclusive for argument, or that the arguments have been too weak to dispose of them.

Before the defendants' counsel begins, it may be observed that the plaintiff's counsel argues on the first point as to the agent's authority; and he argues sufficiently to call upon the defendants to address the court on both points.

Now, let me observe, that a roundabout way of arguing upon facts will not do. Facts follow one another in regular succession; they may not flow in a straight line, and seldom do; but you must follow their course if you would trace out the result. If you dodge about for the purpose of making short cuts you will miss some little rivulet, may be, that has increased the volume and even had an effect upon the direction of the current.

In this case the facts have first to be *reduced to their true proportions*. It is apparent that many of them have been exaggerated, many unnatural infer-

ences have been adduced, and several false conclusions arrived at. The superfluous matter then is trimmed away. It is seen to be superfluous, and the learned judge notes it by sweeping it aside.

The subject being bare, its exact shape and form are seen and the advocate asks, "What *is* the case?" —not for the defendant, but *for the plaintiff*. No matter what the defendants' case is at present, the judge is satisfied with the plaintiff's, and unless you can reduce that, you may as well sit down, because you cannot displace the plaintiff's case by any argument about the defendants'. Therefore, the first question is, "What is the *plaintiff's* case?

Now, mark; all irrelevant evidence is examined and eliminated; shown to be irrelevant, and then taken away. Ambiguous phraseology employed on behalf of the plaintiff, is also disposed of—demolished, with all its inferences, while forensic vituperation is collected like so much rubbish and thrust aside.

The plaintiff says that the defendants' agent told him that the receipt covered the risk from the date when the five shillings was paid. *That is the whole of* his case, and that question has to be argued upon the probabilities.

The agent has sworn the contrary, and therefore the conflict is conspicuous and direct. What is to influence his lordship's mind so as to change it from a present belief in the word of the plaintiff to a future belief in that of the agent?

First, the *conduct* of the plaintiff and of the agent,

and the *probabilities* on the one side and the other.

The receipt in express terms contradicts the plaintiff. The strong probability was, as the learned judge himself acknowledged, that the agent would *not* make a verbal statement in direct contradiction of the receipt he gave. Second probability is, that the plaintiff, who could read and write, would not take the receipt without looking at it.

Another *fact* was that, two or three days after, as the plaintiff himself admitted, he *did* read the receipt, and knew therefore that his goods were not covered.

Probability arising from this was that, if the agent had told him a lie, he would, on discovering it, have gone to the office and complained of the fraud that had been practiced upon him.

Another *fact* admitted by the plaintiff was that the agent had told him that if *the proposal* was not accepted the five shillings would be returned. Improbability arising therefrom was, that the agent should have covered the risk *for the intervening time for nothing.*

Then comes another fact. The plaintiff, after the fire, went to another insurance office, obtained a form, and applied for his money, but the place was closed. Probability, therefore, was, that he would then have gone to the defendants' office and made his claim, *if he had really been told that the risk was covered.* The fact was that he did not go; but having set it about that he was insured in the defendants' Company, a letter was sent to him from them, asking him to call

The next fact was, that some considerable time after he did call, and then produced his receipt. He was told that the receipt did not cover him. He affirmed that it did and that he should stand or fall upon that receipt. Probability arising from this fact is very strong; *if he had been told by the agent that the risk was covered*, and he had been fraudulently deceived, he would have said so when he was told at the office that the receipt was useless. It was clear he never said anything of the sort, because the question was put to the witness with whom he had had the interview, as to whether any such assertion was made, and answered in the negative; the plaintiff, however, had *not been asked a question about it in chief, nor was he recalled to contradict it.* From not having been asked the question in chief, another probability, amounting as near as possible to a fact, arose in overwhelming importance—namely, that he had never told his solicitor he had been deceived, and, therefore, no such complaint had got upon the counsel's brief.

Here the learned judge said he was satisfied that the agent's story was right, and the plaintiff's account wrong, and accordingly gave a verdict for the defendants.

The plaintiff's case had, in fact, been founded on vituperation and insinuations of fraud; the jury had been too ready, as juries often are, to let their hearts govern their heads, in which case justice is invariably turned topsey-turvey. They little think, however, in their ignorance of legal procedure, that ver-

dicts given out of sympathy in the face of facts and law, entail disappointment and loss on the unhappy victims of their compassion.

When ignorance and Prejudice get into the jury-box, as they sometimes do, counsel have indeed a rough time of it. You cannot enlighten stolid Stupidity.

CHAPTER IX.

IN ACTIONS ON CONTRACTS.

A mistake in advocacy is always worth noting. It is better than a maxim, and more useful than any meteoric display.

The following case is one of the simplest, and its moral one of the clearest. You will observe that I am not selecting my lessons from inexperienced advocates, but from the performances of those who are apt to look down with commiseration on the failings of the younger members of the profession.

In this case a Mr. Tent was sued by a Colliery Company for £94. Mr. Tent said, "I admit the debt, but I have a claim against you of a larger amount, because you agreed to supply me with 10,000 tons of coal during the year ending September, and in May you broke your contract, and refused to supply me. I claim the difference between the contract price and the market price from May to

September." The issue, therefore, was simple, although it was necessary to read through a great deal of correspondence and to consider many facts.

This is how the bean-stalk rose.

Mr. Kewsea was engaged for the Colliery Company, while Jack and Harry, two juniors, were retained by Mr. Tent.

When the case was called on, in the ordinary course of things, the Giant would have accepted the admission of the juniors that their client owed the money, and remained quiet in his colossal strength.

But Kewsea was eager to take every advantage for the benefit of his clients, although this overreaching advantage often turns out *not* to be for their benefit.

The pleadings did not admit the debt, so Kewsea availed himself of that technicality. The pleadings evidently were of more authority than the defendant or his counsel. "I don't care," says Kewsea, "about your admitting the debt; the pleadings don't admit it, so I have the right to begin." But it is not always, as the reader knows, the horse that is most rampant at starting which is first to pass the winning-post. I have seen him before now in a very ignominious position at the finish of the race. Get a good start if you can, but remember that a good ending is better. In advocacy it is not always wise to stand upon your strict rights. Concession sometimes wins.

The two juniors smiled together when they heard their gigantic opponent, with a deep voice, claim the

"right to begin;" but his voice did not frighten them in the least, for although these giants are supposed to eat juniors up, Jack and Harry were brave little chaps,and they knew if they could only get the chance they could slay Mr. Kewsea, so they sat close up together on their seat behind him, and swung their legs and touched one another with their elbows, and whispered, "We shall have him nicely by-and-by."

"He's got no case to open," says Jack; "we admit his claim."

"And he can't open ours," replied Harry, "because he doesn't know what it is."

"This *is* fun," said the juniors. "What is he going to begin about? Nobody has hit him."

"Perhaps he is going to tell the judge a nursery-story."

"I wonder if it's 'Jack and the Bean-stalk?'"

At this suggestion both the juniors were immensely tickled, and declared they would call the case by that title.

"He is to be the Giant," said Harry, "and we are to be the two little dwarfs he is trying to eat up."

One need hardly to observe that it is as well before you attempt to answer a claim to ascertain what the claim is, and that you ought to keep your witnesses out of the box until the necessity comes for calling them. You have little use for them until there is something to contradict, to prove, or disprove.

Again, you leave them to be cross-examined and

to give evidence for the other side. No wise man builds a ship on the top of a mountain.

How strange all these observations must seem to the youngest student! Yes, strange indeed, but not unnecessary, since the temptation to begin is strong, sometimes almost irresistible. There is much in advocacy to learn that comes not of practice, and much to unlearn that comes of slovenly and unobservant practice. Here was not an inexperienced junior making this mistake, but one of the leaders, and, therefore, one likes to follow thoughtfully and observe attentively until the bourne is reached.

Mr. Kewsea begins to open. You asked what? My answer is *Bradshaw*. Not irreverently do I say it, nor as if I would say "*bosh!*" I mean *Bradshaw*.

The railway map was produced, handed up to the judge, who looked as if he had seen it before, but said nothing. It was next handed back for the purpose of separating the map from the time-table. It was then re-delivered to the judge.

Now comes the solution of the mystery. It was pointed out that certain places on that map were west of a town called Cockermouth, and that there were other places which were not exactly west of Cockermouth. There was no disputing this, and if that had been Mr. Kewsea's case, it would have been a tolerably strong one.

The juniors smiled meekly, and quietly asked one another what it all meant. As a lecture in geography it was fairly well put.

Then the subject-matter of the opening changed, and observations were made concerning a pit's mouth. This, doubtless, had some reference to the coal trade.

The court was next enlightened as to the mode of filling coal trucks, an interesting subject, no doubt, for a winter fireside, but why it should occupy his lordship's time was a mystery unsolved and inexplicable. And thus, after enjoying this "right to begin," the learned Giant claimed the right to finish, which he exercised by observing that he could not conceive what defence there was to the action. Then the manager of the Coal Company was called and was examined about a variety of things, chiefly to prove the circumstances under which the admitted debt was contracted.

But the bean-stalk is reared, and although it belongs to the Giant, Jack proceeds to climb it, and no doubt from the top he will be able to see a long way; and that is what he desires, for when you once get a good view of the situation you can make the most accurate calculation, and determine your line of operations with an almost mathematical certainty of success.

"Now," says Jack, from the top of his bean-stalk, "will you be kind enough to tell me, sir, whether the price of coals went up soon after the 20th September?"

That is an innocent question enough, just such an one as a child might put. And the witness answered "yes," like a man. It was prospective evidence,

for nobody but the two juniors could possibly tell what it was going to lead to. The judge, however, carefully notes it, because he knows well enough that little Jack from his post of vantage can see a long way all round.

So his lordship says, "Stop a minute, let me take that down."

But the Giant didn't know what it meant, nor his witnesses. It seemed such a far-off, out-of-the-way sort of question.

"Did it continue to rise till the end of the year?" asks Jack.

"Oh, yes," says the witness.

"You say you entered into this contract with the defendants on the 20th of September?"

"That is right sir."

"And he was only to supply the district west of Cockermouth?"

"That was all."

"Did you send coals to his order to almost every other part of England?"

"I did; but did not know it till some time after."

"I suppose the plaintiff must have known it?"

"Oh, yes; but I have found out that these coals were not supplied under the contract.

This is one of the things Jack could see ever so far off. It was a fatal answer, as will appear. The question that follows is like pouring molten lead on to the Giant's head.

"*Under what contract then were they supplied?*"

"Under no contract," *must* be the ridiculous answer.

"Were they not delivered at the contract price?"

"They were."

"Was that two shillings a ton less than the then market price?"

"It was."

The counsel having got that fact leaves it. He has no wish to argue with the witness, but reserves his inferences for the judge. How delightfully the plaintiff's witness is proving the defendant's case will be seen by his speech hereafter, in which all these answers will reappear arranged in the most orderly manner, like birds and beasts walking into Noah's ark in the picture.

Both the juniors chuckled immensely, I thought too immensely, because it made Mr Kewsea, angry. Can the Giant prove any more of the defendant's case I wonder? The junior cross-examines still further, and elicits answers which show that for eight months coals were supplied to the defendant's order for places outside the particular district, and not only so, but that one order in the district is actually objected to by the plaintiffs because it is one of their customers. A good and fatal point!

Then the Secretary is called by the plaintiff and by that means all the letters to him and the Company are got in, in *cross-examination*, a much better way, under the circumstances, than getting them in, in chief, because of various damaging questions interposed, and suggestive comments by way of ques-

tion. This was the very gentleman who supplied the coals, saw that they were sent to places *outside the district*, some to London, which was a long way north of the particular district; proves that the first list of customers sent to the defendant for the purpose of the defendant's contract contained places *outside the district*; proves that he knows all about the contract, that the directors knew all about it, and all about the places to which the coals were sent; knew all about the delay in supplying the coals, the entry of them in the books at the contract price, and a variety of other things more or less useful to the defendant. No one ever knew why these witnesses were called when it was for the defendant to make out his case. But one knows that very often, when you get a considerable distance out of your way, you are apt in your perplexity to try and make a short cut to some place, if haply you may find your track; but it's awkward, sometimes dangerous, especially when you are being watched or pursued by an enemy.

Now here comes the molten lead again.

Do you agree with the last witness that the coals supplied out of the district were not supplied under the contract?

A truly awkward question, because if he does agree it doubles the absurdity of the answer, which was already too big by half, and if he does not agree there is absolutely an end of that part of the case, which part is very nearly the whole.

But the witness agreed, which lets him in nicely for this series of questions.

"Were they supplied at contract price?"

"Certainly."

"At two shillings a ton less than you could have sold them for elsewhere?"

"Yes."

How many tons which were not supplied under the contract?

Tries to make it 300, but is bound, on being gently squeezed, to admit eight hundred, in the month of November.

"Then you presented him with at least sixteen hundred shillings in the month of November alone?"

No answer. Could be no answer. What could a man say who sacrifices property belonging to his employers?

Mr. Kewsea writhed, but he didn't writhe a satisfactory explanation out of his witness or check the flow of molten lead.

"Did the directors know that you were selling their coals by the thousand tons at two shillings less than the market price?"

That again is an abominably awkward question and one would think framed expressly for the purpose of doubling the witness up in a heap.

The answer will be as good as a stroke of lightning, answer as he will, and it will rive Mr. Kewsea's case from top to toe.

"No," says the witness after careful hesitation.

"Then how came you to do this?"

I knew the defendant was a friend of the directors."

Oh, poor man! when you are driven to such shifts as that the judge gets his eye on you; and in that judical eye there is a merry, sceptical and half-compassionate twinkle.

Now a little observation will tell.

"So without the knowledge of your employees, you present the defendant with £75 of their money out of pure friendship?"

"Pure friendship."

Ah! Mr. Kewsea, it is hopeless; re-examination may be useful to set a broken leg, but when your witness is blown to atoms, and scattered to the four winds you cannot put him together again. He is beyond the art of surgery.

The case is all over, but it is necessary, as a matter of form, to bury the remains decently; so the defendant comes to the funeral with the liveliest belief that he is going to get something handsome out of it, one ever saw depicted on a mourner's face.

What a splendid opportunity now presents itself for proving his own case if necessity there were for so doing! He has been corroborated by the other side before he opens his mouth. He fills up the little gaps as nicely as possible; contradicts when necessary with such circumstantiality that you can see the probabilities coming up all over the bed of facts like

asparagus on a fine sunny morning after a warm shower.

Let this be noted by those who think the right to begin at all times a very fine and safe thing, and who are so vigorously agile that they must needs jump before they come to any stile. *There is all the difference between contradicting and being contradicted.* The former process is nearly always the more weighty.

What you contradict is already weakened by lapse of time and cross-examination. Besides which, the contradictor has the better opportunity of surrounding his statement with plausibility and circumstantiality from which may spring irresistible probability.

The fragmentary evidence, elicited for the plaintiff by way of anticipation instead of answer, was discredited and almost dissipated by cross-examination before the necessity of contradiction arrived; it was "torn in pieces or ever it came to the bottom of the den."

So the bean-stalk fell!

CHAPTER X.

IN MURDER TRIALS.

It need scarcely be said that the most important case that can engage an advocate's powers is that of murder. In defending such a charge there is a sense of responsibility oppressive and exacting; a state of nervous excitation which no resolution can allay. You know that every question will be watched with almost painful apprehension, and silently criticised with ruthless severity; and you know also that a single slip on your part may plunge your unhappy client into the fearful abyss. What wonder, then, if at the last moment before the trial you can scarcely comprehend a line of your brief, or bring your mind to analyse and collate the facts?

As the jury are being sworn your sensitiveness and nervousness increase, and you feel almost as miserable as the prisoner himself.

I cannot tell when you will "come to," but I know

that as a rule advocates find themselves in a tolerably composed condition by the time the first witness presents himself to be sworn. This nervousness, let me say, is no physical disparagement, nor is it in any way to be regretted; it is at most a temporary discomfiture, and I hope for the sake of your clients you will never wholly lose it. Nervousness is a vivifying power rather than a weakness. It adds fire to eloquence and quickens the most sluggish faculty. A dull clod of stolid humanity might make a good image for a tobacconist's shop, where indifference to passing objects is highly necessary, but he should never defend me or advocate my cause. I like a nervous advocate; an advocate who feels and trembles with burning eloquence.

But it is necessary to be at home with yourself when the first witness comes, because, knowing what he is going to say, you can pretty well test its value by an accurate measure of his capacity, and a tolerable estimate of his character. *Much will depend upon this.* After you have put a question or two in cross-examination which have been well considered, *so that by no possibility can they injure your client*, all will be well, so far as your mental condition is concerned. You may now proceed to the end of the business (for business it has become) fresh and strong, as if, after a long walk on a sultry summer's day, you had taken an invigorating plunge in a refreshing stream. And how alive the faculties all are! How closely you can examine the evidence. The smallest point is visible; the

most insignificant flaw in that legal chain does not escape your scrutinizing gaze. Nothing is too minute or too quick for observation. I believe you could almost follow a particular fly as he dodged in his devious flight among a crowd of his fellows. I cannot in the least pretend to analyse this state of feeling, and must leave it to medical philosophers; but I know that this state of intensified existence is experienced by some advocates, and I mention it because it has been so often asked "are you never nervous?" Nervous beyond all capability of expression — beyond all power of comprehension. Nevertheless, that state of intense emotional vivacity must be *as far as possible concealed*. And the very effort at concealment will be beneficial, for it will call forth the power of *your will* to subdue and bring your whole self into subjection. When once this is accomplished you will be braced up for the coming struggle, however severe and disheartening it may seem.

Keep your mind upon the witness and you will soon forget yourself. It is *self conciousness* that you chiefly have to guard against. Under no circumstances let your mind wander from the case. Think no evidence and no word and no emphasis or accent unimportant. Examine every point, however minute, with a microscopic eye. The Court is crowded, but remember that to you there is no audience except the judge and jury, and if you so much as think there is, it will be at the expense of your client.

You have a judge, a jury, an opponent, and a

witness; that is your world, and you will find it large enough to engage your whole powers. Your client, even, is no part of it.

In a charge of murder as hopeless as a case could be, counsel had to rely on argument and suggestion; and even for these there was no place till he made room for them. I will briefly give the outline, not as an exhibition of any powers of advocacy, for they were common-place enough, but because it will show that an ordinary exercise of common sense may enable an advocate to make a tolerably respectable appearance in a bad case.

The prisoner was charged with the murder of his wife. The main evidence against him was the deposition of the dying woman, although it was not a "dying declaration." Without it there could be no conviction for the capital offence. In most cases, let me remark, according to my experience, *depositions of witnesses who are absent or dead are read without much analytical examination*; this is a mistake in advocacy. It seems, as a rule, to be assumed that as the witness cannot be cross-examined, the evidence must be accepted as almost beyond the range of criticism, at least beyond the power of cross-examination.

It was obvious in the present case that the dead woman *must be cross-examined*, and cross-examined she undoubtedly was upon every point of her depositions. Her evidence was analyzed, her statements compared, contrasted, and, in one or two material particulars, turned in favor of the prisoner, although

at first sight they appeared fatal to his chance of escape. The unfortunate woman had deposed that she was in bed, had been to sleep, was a little the worse for drink, did not hear her husband come up stairs or enter the room; that he dragged her out of bed and threatened to throw her out of the window; that he went to a drawer, where she knew a knife was kept, that he came towards her and threatened to kill her; that she stooped while he was assaulting her, and afterwards found she was wounded; that he then told her she had but a few hours to live, sent for a doctor and a policeman, and gave himself up. It is clear that if these facts could be handled skillfully there was a defence to be made, although it might not be successful. To acquit himself as an intelligent advocate was all that could be expected of counsel upon whom the unwelcome duty was cast of defending.

In a case of murder, counsel called upon to defend, however hopeless the case, cannot resign his client to the gallows without a struggle. He must contest every point, argue upon every fact, and turn, if possible, the edge of the most fatal testimony. If he cannot base his cross-examination upon a reasonable hypothesis he must still cross-examine with some appearance of reason. He must lay some foundation for his speech, and he must address the jury logically, even though he base his speech on false or fallacious premises. From all this there is no escape; and, more than this, he must cross-examine upon the most deadly and damn-

ing evidence. But this much he has for his comfort—he can do no harm in attacking facts that are clearly and absolutely against him. He may kick these about as he likes, with the hope that something may turn up in the scuffle. While he cannot exaggerate a fact he may possibly modify it. A skilfully asked question may produce an answer which will change the *color* of a fact.

But there is another ground of consolation and encouragement. The judge is invariably *with you* in support of your weaknesses and to the aid of your necessities. It is the greatest glory of the English Bench, to my mind, that the judge, in a case of murder, is ever "of counsel for the prisoner." He is not the Crown, but he is the crowning glory of our administration of justice. *No man in this country can ever lose his life against the conscience* of the judge who tries him. Strictly impartial and yet sympathetic; rigorously just and yet tenderly protective. An English judge trying a man for murder is the highest and noblest illustration of the human character. I say this, not to compliment the Bench, but to encourage the youthful advocate on whom the task of defending in such a charge may fall.

Let me now remind you that *you must not cross-examine to any fact which is in your favor*. Whether you should cross-examine to a fact which is neither for nor against you depends upon your skill, your knowledge of human nature, and your confidence in yourself. If *you know that you will not make a*

mistake, cross-examine by all means, because a neutral fact may be turned to your advantage, and if it be ever so slightly shifted or altered in appearance it will form the foundation of an argument, while every argument in the prisoner's favor is something towards a verdict. Remember, too, that in cases of life and death arguments will sometimes neutralize facts. I say this from experience, and therefore the more boldly.

A jury will generally, if possible, escape from the painful necessity of condemning a fellow creature to death. Just *indicate* the way; you need not lead. Sometimes, it is true, they are too rigidly conscientious, but it is not often the case, and their conscience, as a rule, backs their inclination on the side of mercy.

"I wish I could have cross-examined the wife," said the defending counsel; something might have been elicited to show a quarrel, or otherwise to reduce the crime to manslaughter. The wish contained the germ of the defence. The deposition could be cross-examined, and, above all, the lack of opportunity of cross-examining the woman herself afforded the opportunity of a creditable speech.

One argument, at all events, there was to start with—namely, that although the poor ignorant man, half-crazed by excitement, had had, as appeared on the deposition, "the opportunity of cross-examining the woman," there was, in fact, *no opportunity at*

all. This was a point to elicit tenderly in cross-examination. As the law holds opportunity in its strictness, there was opportunity indeed; but what if the jury should think differently? What if the judge should even think this a point not to be lost sight of in an appeal for the exercise of the royal prerogative? Let it then for the dear life, be cross-examined too. Thus it came out that the prisoner had been hurried from his cell to the dying woman's bedside a few hours after the fatal wound had been inflicted. He was taken without notice, and without the chance of being represented by counsel or solicitor. It is a good point if the man is to be condemned upon the evidence of this deposition, and it will surely stand the prisoner in good stead somewhere, either with the jury or the judge, in fact or in law. In this dead case we want to extricate the counsel with credit as an advocate. As he is bound to do something, hopeless as the case may be, he must do it *well*, if possible. So he starts with this cross-examination of the police-constable.

"When was the prisoner taken to the bed-room of the dying woman?"

"Was any notice given to him that he was to be so taken?"

Counsel knows it must have been extremely short, if notice was ever given; *he knows in fact that no notice was given*, so the question is a *safe* one, and gets well answered.

"Had he counsel or solicitor?"

"No."

A question that *must* be answered in prisoner's favor.

"Was the charge read over to him?"

"No."

"Was he distressed and agitated?"

"Yes."

Counsel knows this answer will be given. It is coming remarkably well, and carefully is it taken down in his lordship's notes. I need scarcely say that an advocate should ask no question which will not at least *seem* to be answered in his favor. *All the facts, therefore, involved in these questions have been carefully inquired into beforehand* and he *knows* what answers will be given.

Then the witness appears, to whom the prisoner said, after the crime was committed—

I've killed her, Jem. I did it with this knife."

Fearful evidence; accurate and unimpeachable. How is it to be dealt with, either in cross-examination or argument?

In this way. First you want to neutralize the effect of the words, "I've killed her." Your question then will probably be, "*Did he seem excited?*" The answer you *know* will be "Yes," because you can *see* in the witness' manner and hear it in his tone. You get your answer, and from his eagerness to give it, you know that if you ask him, with proper tone, "Did he seem sorry?" he will say, "Yes, sir; very sorry."

From what you *know* as having taken place, you will press the question, "Did you say it could not

be true that he killed her?" The answer is "Yes." "Did he say, 'Jem, it's *too* true?" Jem says, "Yes, he did."

There's much argument to be used to the jury in that little word "too"—an argument *that there was no intention to kill*, and if you show that, you may get at least a recommendation to mercy, which may come alike, for aught you know, from jury and judge. If you do, your man is saved, and that is the glorious triumph of your art.

But now, you see, you have a good witness in the box, whom, if you handle wisely and in accordance with the laws that govern and reveal human nature, you will do something more with him yet. You now know that he will say anything in favor of the prisoner that is possible. Then ask him this—

"*Was the prisoner a kind and humane man?*"

"He was, sir."

"Was that his general character?"

"It was."

"Was he sober, quiet and industrious?"

"He was."

The next question you must put with somewhat more of preparation, for it is *the* one with which you desire to strike a lasting effect upon the jury before you sit down.

Let me ask you—"You have often seen the prisoner *and the deceased woman* together?"

"Yes, sir; very often"

"In their home and in public?"

"Yes, sir."

"Did he always treat her kindly?"

"Always."

"And seem fond of her?"

"He was very fond of her; and there never was a kinder husband or a more hard-working, sober man."

There is nothing else to ask. All has been done that is possible by questions, and probably not a little by *effect*. Not one question but has been answered in your favor, and you sit down with a look from the jury, which affords you a trifle of encouragement for your future progress.

The doctor gives doctor's evidence—length, depth and nature of wound, with the consequence clear and hopeless. Still, you must try for something in the prisoner's favor. Is anything to be done with evidence of this sort?

To answer this, you must ask yourself again, *What is your defence?* What *can* your advocacy lead to?

Your only defence is that it was not wilful murder, but manslaughter. Knowing this, can you cross-examine the doctor? Can you elicit that the wound might have been occasioned without having been wilfully inflicted? That is what you have to do, if possible, but in heaven's name take care, or a single question may make your defence aud the prisoner's chance of being recommended to mercy utterly hopeless. You will not ask if it might have been done by accident. The doctor would shake

his head, and the most probable answer would be this:—

"Hardly." In all probability he would say no. Besides, the question is objectionable—it is a question for the jury, not for the doctor. You must get, therefore, as far away as possible from this kind of examination, objectionable or unobjectionable. It is the answer you want, but it is just the very question you *must not* put if you value your reputation. What, then, is to be done? He is a clever man, this doctor. Can you not see that he is a humane one, who will help you if he can? *Is he not sympathising with the prisoner?* Had he not just given him a pitying glance? and do you not see that if you ask two or three questions, the answers to which will neither compromise his reputation nor strain his conscience, he will answer as favorable as he can, and perhaps save the life of the wretched man. Doctors are almost invariably humane.

At least you can try a harmless question or two, and if you cannot feel the way safely to *the* question you desire answered, you may leave him before it is too late.

"Where do you say, doctor, the wound was?"

The doctor describes it.

"Will you point out the exact spot to the jury?"

The doctor shows the place.

"Now first indicate the *direction.* I see, a little downward, is it?"

"Slightly."

"Then the hand might have been in that posi-

tion?" (indicating that the arms might have been encircling the woman's body.)

"Quite so," says the doctor.

"As if they were struggling?"

"Yes."

"Then it might have been done in a struggle?"

"Undoubtedly," says the doctor; "*and in all probability it was.*"

That is the exact answer required, and not another question must be asked. Argument deducible from this that it might have been an accidental wounding, or at least that the jury may legally find a verdict of manslaughter. If you cannot get probability, at least endeavor to secure possibility, which is sometimes good enough for the jury.

There's a good deal now that can be said.

It is possible to attack the statement of the dying woman. What was her physical condition when she made it? What the state of her mind and memory? What were the circumstances under which it was made? What is the nature of the statement itself? Does it disclose all that must have taken place? Are there gaps in it—expressions which are ambiguous, conflicting, or irreconcilable? of a twofold meaning? of a nature that one construction may be in favor of the prisoner, and another against him?

Whenever this is the case you may have made a strong point, and that point may become the pivot upon which the defence may turn. If the statement does not contain a perfect narrative you have a fine opportunity for suggesting probabilities, and these,

as you know, have often the force of evidence itself, sometimes, indeed, supersede it. Evidence may be deceitful or false, probabilities are never the one or the other, although you may draw a wrong inference from them. Cicero says that swearing to opposing facts is no good in the face of the strongest probabilities.

Again, circumstances are valuable only as suggesting probabilities; but if there be a gap in the circumstances you may suggest incidents, if they fairly arise from just inference from the other facts. Circumstances may not lie in the sense of not being what they are, but they often deceive *in not being what they seem*, and in not belonging to the series of other facts with which they are supposed to be connected. The strongest chain of circumstances is only a chain of probabilities, and if you show an improbability amongst them there is a weak if not a broken link.

In this case the moral guilt was reduced to constructive murder, that is murder without the intention to commit it, although there was an intention to commit another crime.

The jury asked whether, if the intention was to commit grievous bodily harm and death resulted, it was murder. The learned judge said he was bound to say that that was the law of England.

The verdict was guilty, with a recommendation to mercy, a recommendation which, under the circumstances, developed by the progress of the case, and supported as it was by abundant evidence to character, was given effect to by the sovereign.

CHAPTER XI.

IN CASES OF ROBBERY.

"GENTLEMEN of the jury, I must beseech you to dismiss from your minds all that you may have read or heard of this case, and come to the consideration of it with unbiased judgment. Gentlemen, from the village of Chorbakon to the village of Clodthorpe, where the prisoners resided, is two miles. (Assistant Counsel whispers something with intense agitation). " Oh—I beg your pardon, gentlemen, I am sorry it is two miles and seventy-six yards."

"Where do you measure from?" asks the judge, "Is there any map of this part of the county?"

There is tremendous excitement in the "well" of the Court; the other attorney and his clerk vigorously stare at one another for some two minutes, then the learned counsel stoops and asks if there is a map or a plan.

"N-n-no!" stammers the assistant, "Treasury

won't allow plans—disallowed expenses in last murder case—man acquitted for want of plan—scandalous detriment to administration of justice wont allow surveyor's fees."

"No my lord," says the counsel, "I am told there is not a plan, my lord."

"It's a great pity, says his lordship, with a twinkling smile; "if you are desirous of being accurate, and it is necessary to go into these minute particulars. we ought to have a map. This is a matter apparently of yards and feet; it may be inches for ought I know. Where do you measure from?"

"Pump to pump," whispers the assistant, with his hand sideways to his mouth so as to shoot the sound into the ear of the counsel.

"Pump to pump," repeats the counsel.

"Wait a minute," says his lordship, "let me take that; if anything turns upon it—pump to pump—does anything turn upon this?"

The assistant turns upon it with great rapidity, and says:—

"We trace them. Oh, yes, yes, we trace them, of course—pump near the pound."

" The case for the prosecution," says the learned counsel, "is that we trace them on the night in question along the road from Clodthorpe to Chorbakon. They left Clodthorpe at five minutes to eleven, and the policeman who will be called will say that they were both under the influence of beer."

"But surely," says his lordship, "they did not get so influenced by going from pump to pump; if

so, they are the most extraordinary pumps I ever heard of." (Great laughter, notwithstanding the solemnity of the prosecution.)

"Gentlemen," continued the imperturbable counsel, "I shall show you that from the high road that leads from Clodthorpe to Chorbakon, there is a pathway across the field leading up to the house of the prosecutor where the crime was committed. Along that path there were footprints. The night was wet, and the nature of soil was such that the impress of a boot could easily be seen. I shall show you beyond all doubt that one of those footprints was the footprint of one of the prisoners at the bar —(sensation.) That will be an important matter for your consideration. Now, gentlemen, that being so——

"*What being so?*" whispers the counsel from the defence.

"Please do not interrupt. I shall show you, gentlemen, that on the coat and trousers of one of the prisoners there were stains of blood—(more sensation)—I shall also prove that when the prisoners were asked what time they reached home, Walker said half-past ten, and Shuffler said five-and-twenty to eleven; so you see, they gave different accounts of the time of their arrival. They also contradicted one another as to the time they left Clodthorpe, and you, gentlemen, will have to say whether, taking all these facts together, the prisoners are guilty of the crime with which they stand charged."

In all this opening there was not stated a particle

of evidence against the prisoners. But you could not stop the case, inasmuch as the judge would be obliged to say the opening speech is nothing, with which observation you might conscientiously agree, feeling at the same time that there was a good deal of it.

Now comes a stalwart member of the "Force," with a large pair of dirty, hob-nailed boots, carefully tied up in manifold papers and fastened with many strings, as though there was danger of the boots making their escape. There's a charming innocence about provincial policemen which is always amusing and sometimes dangerous. They invariably get prisoners to take them into their confidence, as though the police were their legal advisers or their best friends, and would do anything to get them acquitted.

"Where was you last night, Jack?" asks the friendly and familiar "Robert" of the provincial force.

"At Clodthorpe," answers the prisoner, whose name was Walker—a true answer, which the constabulary cross-examiner notes against him.

"What time did you leave, Jack?"

"About ha-'past ten," says Walker.

"Ha! and what time did you get home?"

"About a quarter past eleven."

"Was anybody with you?"

"Yes."

"Who? was it Shuffler?"

"Yes," says the ingenious Walker.

"Did he come home with you?"

"Yes."

"You didn't steal any fowls from Mr. Bodgers, did you?"

"No," says Walker, "I didn't and never went near the place."

"O," says Robert, "but there was a robbery between half-past ten and half-past eleven, and I shall take you on suspicion. Let's have them there boots, I think they'll correspond. So I took the boots," adds the active and intelligent one, "and found they co-responded 'exackerly.'"

"You compared them?"

"I did."

"I object," protests the counsel for the prisoner; this man's opinion as to whether the boots co-responded is not evidence. (Laughter).

The judge takes a note of the objection.

"I then went to Shuffler's father," says the policeman, "and axed him if the son was in."

"What he axed the father behind the prisoner's back is not evidence," objects the counsel for the defence. (Laughter).

The counsel for the prosecution submits it is; good quarter sessions evidence of the excellent quality of hearsay—"something" he avers, "accompanying an act."

"Not evidence," says his lordship.

(Attorney for the prosecution is quite thunderstruck; never heard such law laid down since *he* was clerk of the peace.)

"What did you do next?"

"I axed the father for his son's coat and trousers."

Objected to.

"More wishy-washy than the last," holds his lordship.

But the coat and trousers are somehow produced by the intelligent constable, and he says that there was a kind of "down" on the trousers. ("A downy observation that," whispers the usher.) But the policeman adds, with awful emphasis, which makes quite a sensation in Court, that "there's stains of blood or summat just like it in the trousers." There was first, sensation, and then laughter, in which his lordship tried not to join.

Then he described how he cross-examined Shuffler when he had succeeded in getting him into *his confidence*. After which the policeman's turn to be cross-examined came, and a dire retribution it was.

"Is it your practice to cross-examine prisoners?"

"Well, sir, it's yushal like to axe 'em a bit "

"Why?"

"To see if we're to take 'em into custody."

"But you had them in custody. "Was it to make evidence?"

"It was to hear what they'd got to say.'

"About what?"

Robert rubs his chin.

"What did you cross-examine them for?"

"For the Clerk of the Peace."

"But hadn't you enough evidence without putting these questions?"

That was awkward for Robert. He is blocked whichever way he turns, and all the friction produced by rubbing his chin will not help him. The jury wait his answer, and not getting it, look up into his face, which is a red as the judge's gown. He is evidently considering, if consider he can under such circumstances, what answer he shall make. He wishes the counsel would repeat the question, so as to give him a fresh start and a little more time. But the advocate knows better than that. When he gets a witness into a hold he keeps him there, and, if possible, shuts the lid down. The judge looks at him, a rebuke in itself, and then, with monosyllabilic terseness, says:—

"Well?"

After a further pause Robert is asked:—

"What did the Clerk of the Peace want with it?"

"For a remand, I s'pose."

"Was there not enough evidence unless you made some?"

"I s'pose there warnt, sir, if you come to that."

"Did the clerk say so?"

"Yes, sir."

"Then, wanting it for evidence, did you say, 'Now, Jack, my friend, at present there is no evidence against you, but just answer me a question or two, and I'll soon make some. I will write down your answers so that there will be no mistake?' Did you say that by way of caution?"

"No, sir."

"Do you know that the learned judge is not allowed to put a question to these men?"

"Don't know, sir; s'pose a judge can do what he like."

"Did you make a note of the conversation?"

"No; but the Clerk of the Peace did."

"Is he the solicitor for the prosecution?"

"I believe so."

The policeman gladly enough left the box, and as there was no evidence the prisoners were acquitted. Robert's opinion that there was a correspondence between the boot and the footprint was worth nothing. There might have been another boot of the same make, or another person might have worn the prisoner's boots on that night. Besides which, the policeman had taken the shoe belonging to the other prisoner, and that not only did not correspond with the impression on the ground, but differed entirely from it. The down on the trousers was no more evidence that the wearer had stolen a fowl than a button off a policeman's coat in the possession of little boy, would be evidence that he had swallowed a constable.

CHAPTER XII.

ILLUSTRATIONS OF A MAN CONDUCTING HIS OWN CASE.

In all cases tact and judgment are indispensable to success. What may be called "slogging advocacy," is of little use against art. To bring out the right point at the right time, and to call the right witness just when his evidence will be most effective, are often of vital importance to your client. To arrange your evidence, and to produce your arguments in due order, is as necessary in a cause as the proper disposition of troops on the eve of battle. A mob is no use to a disciplined army, nor is a confused mass of tangled evidence likely to be effective against the well ordered case of your opponent. Although your cause may be right, the other will *seem* so. And juries generally, like other men, act upon what seems to be, rather than what is.

The illustration I am about to give is from humble life; and the advocacy to which I direct atten-

tion is not the advocacy of a professor in the art. It is a defence "in person;" but the "person" shows that he possesses just that knowledge of human nature which the professional advocate may sometimes lack. Low life, no doubt, is revolting to the fastidious mind, but at the Bar you will do all the better by having some acquaintance with it. Human nature is not the monopoly of the high-born, the educated, or the wealthy. You will find a good deal of it lying about the slums; and if I mistake not, you will perceive a trace of it in the following case. I am not about to give an instance of brilliant oratory or ingenious cross-examination. The lesson is a lesson in tact and judgment; in the mode of dealing with evidence, and, albeit, uncouth and rough, in the manner of disposing of its effects. It will show you, indeed, by a rude and unpolished example, how a case should be handled. I suppose a pauper's body would be as good for anatomical purposes as a body which died worth a million. The same kind of nerves, the same kind of tissues, bones, limbs, muscles, and organs.

But will students condescend to learn advocacy from a coffee house keeper? And if not, may I enquire why not? Let us recollect that advocacy is not fine language. You may quote Cicero, and make a bad speech, or you may make the most tremendous oration, and not know how to cross-examine. A good case made against you may be hopelessly fatal unless you know how to deal with it. Is it possible then, that an illiterate, uncultured coffee-house

keeper can tell us how to deal with the points of a case so as absolutely to destroy them? What does he know of advocacy? He knows nothing in the artificial sense; but having a knowledge of men, he stumbles over the facts made against him and tramples them out of all shape and consistency. He was not present when the case began, and so it was opened as undefended. It looked an easy winning case, and one for considerable damages. The plaintiff was young and pretty: you would almost be inclined to give her five-and-twenty pounds for being so pretty. Her looks deserved it. I mean that a fascinating plaintiff is almost sure to win her way with the jury. Juries are so human. And the appearance of a plaintiff or a defendant, if of the weaker—that is the stronger sex—is always a *factor* with which the advocate must reckon. The learned counsel opened the case remarkably well. There was not a word too many, nor a point too few. He was a modest junior, and assumed no airs; attempted no jokes and ignored all attempts to evoke sympathy.

The pretty plaintiff gave her evidence in a very nice, calm, unaffected way. Told of the promise and the breach, in such simple manner that the artless conduct of the defendant spoke for itself. It was apparent to all who heard her, especially to the jury, that a man who would not marry such a loveable and loving creature when he had the opportunity ought to pay for his folly.

Unfortunately, just as the judge was about to sum

up, in came the defendant. What a marvellous sensation was produced by his appearance! And what an insight into human nature he must have had! He was unshaven, ill-clad, I should say unwashed, and was got up (without appearing to be so) in the most unattractive manner you can imagine. His appearance quite *lowered the plaintiff* in the eyes of everyone in Court. If the jury would give something for her beauty they would certainly award nothing for her taste. Damages decreased therefore on the view of the defendant, as much as they had gone up on that of the plaintiff. So they are now on a level. That was the first good point the defendant made. I am quite aware that counsel could not have made this point for him so effectively; but he might have made it nevertheless. How?—will be asked—how *could* he show what kind of man the defendant was? I answer, by cross-examination. If he could not produce the original, he could exhibit a picture of him, that is, if he were skilled in the art of presenting a picture by cross-examination. He certainly could not do it by bullying the plaintiff, although he might have considerably increased the damages. If you are not an artist, you need not smudge everybody who comes into the witness-box with a tar brush and think you are touching up their complexions—that is not the way to make yourself look beautiful, even by contrast. But now comes a second view of the defendant. You can perceive that his knowledge of the points of his case is perfect and that he knows how to deal with them. You will

also see that he puts them artfully if not artistically; and forcibly, although not scholarly. He has no elocution and no oratorical powers as the learned impute oratory; but he can speak so as to persuade, and argue so as to convince—two good qualities, I apprehend. He can cross-examine, too, although he has not had an hour's practice. He asks just the *questions that are likely to produce favorable answers.* He understands what he is doing, and why he is asking every question that is put. He knows what is wanted, and his principle object is to convince the jury that the occasion of the breach of promise was not his; that although he broke the promise, it was *in consequence of the conduct of the plaintiff herself,* for he was anxious to marry her. His object was to reduce the damages to a minimum. Now, observe how he does it. You may learn it from this natural advocate as you may learn what motions are necessary in swimming from watching the evolutions of a frog in the water.

And first, let me say, *he did not cross-examine as to the plaintiff's character,* nor did he make any imputation upon it. The common trick too often resorted to of trying to blacken your opponent's reputation to the infinite damage of your own client, was not the coffee-house keeper's way of advocating his cause. Wherever he had learned it he knew better than that. Secondly, he did not deny the promise or the breach; he was not foolish enough to attempt the impossible.

I have heard advocates say never admit anything.

The coffee-house advocate knew better. In civil causes, *whatever cannot be denied had better be frankly admitted*, and for this principal reason, that the *proof may damage you more than the fact proved.* It is often the *evidence* and the surrounding circumstances that you have to fear more than the thing itself. They may aggravate the default and exaggerate it, distort it or make it look infinitely worse than it is.

The student, no doubt, is thinking, "What can this man know of cross-examination?" Let the student put the same question to himself. We shall see. He cross-examines for the purpose of showing what led to the breach. There could not be a better purpose, and it was one which involved a reason so natural that the jury could see it at a glance—not only see it, but calculate it in pounds, shillings and pence. The reason why he broke off the engagement was *coldness on the part of the plaintiff*, and when the jury looked at her and then looked at the defendant, it was manifest that she must turn cold, even if she did not freeze. How could such a man inspire warmth? His looks and manner were below zero ever so many degrees. No pretty girl twenty years his junior could warm herself up to a matrimonial and enduring heat.

Notwithstanding all this, he was, I believe, a most respectable, well-to-do tradesman, but he was a consummate actor and a good advocate, although he made pretensions to neither character.

Now comes another point. He asks about a letter in which he had complained of her coldness.

"Had he given notice to produce?" asks the counsel for the plaintiff.

"Oh, no, my lord! I aint acquainted with the forms of law. If I had had the *means of employing counsel*, I should not have been in this predicament."

No; but he might have been in a worse. So he says if he had but been able to procure legal assistance he would have made her produce a letter which would have shown the sincerity of his affection and his complaint of her coldness towards him; three good points in a cluster, but distinct and clear as windows with a light behind them.

"But you shall have every opportunity," says the learned judge. "You shall not suffer because you you cannot afford to have counsel."

I presume the reader perceives how the defendant is getting on in the way of reducing damages, and probably believes he could not have done it better himself.

"Thank you, my lord," says the poor man most reverently. "I couldn't afford to pay my solicitor and so he wouldn't go on with the case."

"Very well," says the judge, "what is the date of the letter?"

"It was while she was away in Cumberland, my lord. It would be about March. I wrote to ask her when she was going to return, as I had five children, my lord, and no one to look after them."

"Five children!" exclaims his lordship, with astonishment. "Why, how old are they?"

"One is seventeen, my lord, and the youngest is two."

Damages are certainly lessening. This is quite an unexpected style of advocacy, but so effective that no counsel could have surpassed it by any manner of eloquence or cross-examination. These five children come in just at the right moment, and the jury see them hungry and ragged.

"Have you got that letter, Mr. Jones?" asks his lordship. What a fuss there is about that letter, to be sure!

"Oh! yes, my lord; here is is. It shows the promise clearly. I read part of it in my opening."

"Yes, but now the defendant is going to read the other part.

There it was, truly enough, a good, honest, manly letter, asking the plaintiff when she was going to return, and stating that he was anxious to get married as soon as possible, as his business *was going to rack and ruin.* He could not afford to have a housekeeper, and there was no one to look after his five "motherless children."

"What do you make of that?" asks the judge.

"My lord," says the defendant, "I want now to show what answer she returned to that letter which was the reason of my breaking off the engagement which I confess I did, and believe any man would do if he received so cold a letter as this here."

The letter was handed up, and certainly it did not

breathe any very warm sentiments. It was a business-like affair altogether, but still did not warrant a breach of the promise to marry. Damages still decreasing, that is clear, because not much injury to feelings—feelings not up to anything like matrimonial point as you would expect in one so pretty—the letter, indeed, reads somewhat pert; she is not quite a scold, but a very indifferent lover evidently.

"Very well," says the judge, "but now then you must pay, it is a question of damages only."

Then the counsel cross-examines as to the defendant's position, so as to show how much *pecuniarily* the plaintiff has lost, that being apparently her only claim now, as injured feelings are no longer a marketable commodity. The defendant, however, is as good at answering questions as he is at asking them.

"Now then," says the counsel, "You live in a house of £120 a-year rent, don't you?

"I don't deny that," answers the defendant, "And that is what makes me so poor; if I was the landlord it would be different."

That seemed to strike the jury as a common-sense argument. It is one thing to have to pay and another to have to receive £120 a-year. Heavy rent does not usually make a tenant wealthy, and of this opinion seem his lordship and the jury.

"And more than that," says the defendant, "They've nearly doubled my rent this last year, and that has nigh doubled me up. I could hardly get a living before, and now I don't know how I am to live. The business is worth nothing."

"But you've got some other property, haven't you?

"Yes I have. I've got these here pawn tickets," producing about a dozen.

There was a peal of laughter at this stroke of business. Pawn tickets may be a valuable property, but they don't usually indicate affluent circumstances, especially when they relate to a watch, a great coat, a silver buckle, an arm chair and a hat.

"Do you mean to swear, sir, that you have no money?"

"I do," says the witness; "they thought I had."

"Why do you say that?"

"Because they was always trying to get some out of me."

"Who do you mean by they?"

"Why this plaintiff and her father, the old gentleman who was a witness."

"How did they try to get your money?"

"They took me to a place where they had got an old painting about eight feet long by six, and wanted me to give £700 for it. As I told them, I hadn't got 700 pence, and if I had what was the use of a picter of that size to me? What's a man in my position want with one of these here old masters."

"Now sir," asks the counsel, "do you mean to swear that you have no money in the bank? I warn you she has sworn that you told her that you had."

"Its quite right, my lord, I did tell her, and here's my banking book, and your lordship will see that I have put a few shillings a-week in the saving's bank

for the purpose of paying my rent, and hard enough it is to scratch it up."

His lordship looks at the book and finds that he has never had more than £7 10s. in the bank. Not a great amount certainly; and so far as one can see up to this point, if the marriage had taken place, the lady would have acquired no very affluent position out of five children, a number of pawn tickets, £120 a-year rent, and a few shillings in the saving's bank.

"Now tell me, did you not break off this engagement because you were going to marry a widow with £900?"

Here there was great laughter in which the defendant joined, and then answered:

"I only wish it was true. I should very much like to marry a widder with £900, or for the matter of that I'd take less. I wouldn't keep a coffee shop long."

The imaginary "widder" having been thus promptly disposed of, there remained one other point to cross-examine this prosperous defendant upon. If he possessed a really flourishing business the fair plaintiff had lost a home of some value, and the measure of damages must be estimated thereby. To ascertain then the estate of the defendant and his capacity to pay damages is the next object of the plaintiffs counsel. As a rule, I think this part of the business dangerous to venture upon except you do it in the most general way. If you enter into details you may be sure the defendant has prepared himself for every question. The position of a man as a general

rule is a better test of his capacity than the items of his expenditure. If you get the style of the man the jury will apportion his income to it; but if you try to get at his income you may find that he places himself on the brink of ruin. This proposition of course does not apply to fixed and determined positions, which go either with or without proving, and concerning which you may make your choice with safety.

"Now," says the counsel, "what are your takings?"

"I have not taken much lately," says the witness, producing a dirty red memorandum-book.

"We have been told you take £7 a day?"

It was hardly a question, but it did duty as one.

"I suppose the old gentleman told you that; it's just like him."

This answer provoked much laughter; the learned judge himself could not resist. For a time it was doubtful what "old gentleman" was meant, and everyone supposed it was the particular "old gentleman so often referred to by persons who have a lively faith in his personality. It really referred, however, not to the "Father of Lies," but to the father of the plaintiff, who was shown by the defendant to have been a very active agent in the promotion of this breach of promise. But the dirty book is produced, and the defendant is asked "what he has got there," generally a dangerous question enough, for, like a needle, it often draws with a thread of

evidence that stitches the parts of a ragged case together.

"*It's an account of my takings*," says the melancholy creature; and the book being handed to the judge shows £7 a-week instead of that amount per diem. A very carefully kept book it was, not concocted as you see, and it extended over several months, *as long at least as the legal proceedings had been on foot*. The witness then goes into the cost of bread and butter, coffee and general expenses, not omitting the milk; and there being a milkman on on the jury, he knows that that is an important item, water it as you like, in coffee-house business? so that on the whole the wonder is how the man can support his five children, and why the whole family is not in the workhouse, or singing doleful songs in the streets.

What is to be done? the more you cross-examine this witness the worse the case looks, so the learned counsel wisely leaves him to my lord and the jury, weary of a hopeless task. It's like pushing a jibbing horse uphill.

My lord tells the jury that the proper measure of damage is what the plaintiff has lost by not becoming the wife of the defendant (and as Roscoe puts it, "*the affluent circumstances of the defendant are evidence on the question of damages*"); his lordship also says the injury to the plaintiff's feelings may be considered. Two items therefore to be assessed.

The jury consider these "affluent circumstances," and this "injury to the plaintiff's feelings," and give

effect to the conclusion they arrive at by the following verdict:—

"My lord, we finds a werdick for the plaintiff with 40s. damages, and thinks as how she have had a werry narrer escape, and is well out of it."

Judge agrees with the jury, and does not allow costs, which was as bad as if the solicitor for the plaintiff had been the defendant and lost the verdict. This was the best defence to an action for breach of promise of marriage I ever heard. If you wish to cut down damages this coffee-house keeper has shown the line to take. A chorus of voices says "of course!" But it is by no means of course; not one in advocate twenty could have done it. Most of them would have tried to break down the plaintiff on the promise or breach, or have endeavored to show that the man was justified in breaking the engagement on account of the character of the plaintiff, and this, as a recent case has proved is the most dangerous of all defences. It cannot be too frequently impressed upon the mind of the advocate—*leave character alone unless it is material to the issue or fatal to the credit of a witness.*

The usual mode of dealing with this case would have been to fly at the plaintiff with the object of showing that she was unworthy of belief, and that she released the defendant from his promise. Somebody's character would have been attacked, perhaps her father's, or mother's, or her grandmother's, or the solicitor's, or even the conduct of the plaintiff's counsel. Anything and anybody rather than *the*

issue. Usually an eloquent speech is made against the policy of permitting such actions. But the judge having to sum up after the eloquent advocate does not permit the main issue to be shunted, and the jury to be trailed along by a false scent on a fool's errand. There may be differences of opinion about the advisability of abolishing actions for breach of promise; but the question for the jury is whether there has been a promise and a breach, and if so what damages. The jury are not a public meeting to carry resolutions for the amendment of the law, but to take the law as it is from the judge and enforce it by their verdict.

———o———

In the trial of Rush, in 1849, for the murder of Mr. Jermy, the prisoner defended himself. The principal witness against him was Emily Sandford, who had been governess to his daughter. This witness he had seduced under a promise of marriage. She gave material evidence for the crown as to Rush's absence from his home at the time when the murder was committed; also as to his conduct on his return, especially his telling her, should she be asked how long he was absent on the night in question, to say about ten minutes. Almost every

question the prisoner put in cross-examination was dangerous, if not fatal. But among others he asked this, with a view to showing enmity and spite on the part of the witness:

"Have you not told me you would make me repent of not keeping my promise to make you my wife after the birth of the first child?"

This question was damaging in every way, even without an answer, and consequently the worst form of question that could be put. It was based upon the assumption that the witness *had been swearing falsely against him for the purpose of taking his life, and yet it assumes that she will not commit perjury in answering his question.* In either view her answer must be against him; but if there had been reason for putting it, still it ought not to have been put. If she ever threatened him in the manner alleged, a skillful cross-examination would have elicited the fact without the question; and long before any such question was necessary, would have made it unnecessary by her manner in the box. It is the worst form of cross-examination that simply obtains a denial to what you wish. But this question drew more than a mere denial. This was the answer the witness gave with solemn emphasis, and amid profound sensation in Court:

"I told you when you broke your promise, that before you died you would repent of not keeping your word. I told you that you would never prosper after breaking such a promise. You said I had made you a reformed man, when I charged you with

being unfaithful, and you promised solemnly to marry me."

These were awful words, and their reproachful accents must have been remembered by the prisoner with fearful clearness, while their prophetic truthfulness was rendered plain in that dreadful moment.

Mr. Baron Rolfe, in sentencing the prisoner, made these observations:

"In the mysterious dispensations of the Almighty, not only is much evil permitted, but much guilt is allowed to go unpunished. It is perhaps, presumptuous, therefore, to attempt to trace the finger of God in the development of any particular crime; but one has felt at times a satisfaction in making such investigations, and I cannot but remark *that if you had performed to that unhappy girl the promise you made to her*, the policy of the law which seals the lips of the wife in any proceeding against her husband, might perhaps have allowed your guilt to go unpunished."

CHAPTER XIII.

PEEPING INTO A JURYMAN'S MIND.

It will sometimes happen during the progress of a case that a juryman is anxious to put a question. He is most frequently, with great judicial politeness "shut up" by the judge, who tells him that "by-and-by" if he pleases, when the learned counsel has finished, if there is any question he would like to put, &c., &c. The poor juryman, who probably has never been in a jury-box before, feels awfully snubbed, although snubbed he really is not, and withdraws as completely within himself as a snail within its shell on the approach of danger, and the question is either forgotten or the juryman will run no further risk Whenever this happens *be careful to remind the judge that the juryman desires to put a question.* It may be against you, or for you, or altogether irrevelant. In any event you will gain something from it—you will get at least a peep into the juryman's

mind, and a peep through the smallest chink has often revealed strange things; they may be only small matters twisting about in the mental kaleidoscope of the juryman's cranium, but they may be very important for you to know, nevertheless. I have seen cases won by these little sudden peeps. Of course, the advantage is equally great, you will say, to the other side. My answer is, that depends upon circumstances. Some men will glance in at a window, and see only their own reflection. Others will look in and see people inside, and learn a good deal of what is going on. Sometimes you will learn that the juryman is misunderstanding the drift of the whole case, bothering his poor head about some totally irrelevant matter; in any event, it will be useful to know what is passing in his mind.

CHAPTER XIV.

SEVERAL MODES OF CROSS-EXAMINATION.

Let us now take an example of a bad and a good cross-examination; and I would like the student to ask at every question herein set down, whether or no he can determine for himself its quality. It will afford some test of his knowledge of the art of advocacy if he can. For I may say that every question I shall give has been put over and over again, even by leaders, without any definite calculation as to its value, or any knowledge of its practical effect, either on the mind of the witness or the jury.

Let us suppose a man to be charged with having, three or four years ago, at a country fair, purchased a horse, and paid for it with a bad cheque. The following cross-examination will disclose all the facts that are necessary to be known. The whole issue is as to the identity of the prisoner.

Question No. 1. "Had you ever seen the man who bought your horse before that day?"

"No."

2. "How long were you with him on that day?"

"Several hours."

3. "Were any other people present?"

"Yes, many."

4. "When did you next see the man after that day?"

"Not till I saw him in the police station.

5. "Did you know him directly or did you pick him out?"

"Knew him directly."

6. "How do you know him?"

"From his appearance."

7. "And will you undertake, upon your solemn oath, to swear he is the man?"

"I will."

The first question is right, the second wrong, the third nearly right, the fourth right, the fifth, sixth and seventh utterly wrong, *and the man must be convicted!*

The first question is right, because the defending counsel knows what the answer will be, and he must elicit it.

The second is wrong, because he does not know what the answer will be, and the witness will understand from its form how to make his reply as telling as he can against the prisoner.

The *fact* which the counsel, however, was desirous of eliciting was all important to the defence,

and should have been got out of the witness *in favor of the prisoner* and not *against him.*

The third question was nearly right, because it was better to place the man to be identified among a crowd; but it ought to have been put in a less direct form, for fear the answer should be against the prisoner. The witness evidently answered it as he did, because he thought it told most strongly in favor of his own accuracy and against the prisoner.

The fourth question was right, because no other answer was possible, as was known to the counsel, not only from information communicated by the prisoner himself, but for many other obvious reasons.

The fifth was wrong, because it would be sure to be answered against the prisoner, and *could not, in the form in which it was put, be answered in his favor.*

The sixth was wrong, because it gave the prosecutor the opportunity of giving *reasons* for his belief, *making his belief look like a fact.*

The seventh also was wrong for the same reasons, and also because it was a mere repetition of what the prosecutor had sworn in chief. It was not cross-examination at all, and could only confirm the evidence already given. And, again, it was only asking the man whether he would *undertake* to do something. So that altogether it was as bad as all the other bad ones put together

Let us now see another style of cross-examination to the same witness.

No. 1 is asked.

Instead of No. 2, let us ask *where* he saw the man. Then we shall get the fact, without asking for it or seeming to desire it, *that the man was with other people*; and the crowd in the fair or in the public house will come out as nicely as possible.

Safely, then, may be asked *what time it took place*. The witness knows nothing of your object, and answers you *to the best of his belief*, like a lamb bleating for its mamma, "Twelve o'clock."

But how, then, having got twelve o'clock, shall we keep them together several hours? By no means. You *wonder what time he left the fair to return to his home;* and, not knowing what you are driving at, and that presently you are going to do a little mental arithmetic and reduce everything to minutes, the witness tells you that he *didn't stay long after the "ornary" which took place at one o'clock.* He is already afraid of making himself drunk, you see, and away he goes home, as sober as a judge, "*about two to ha' past.*"

You see, you don't want the answer "*several hours*;" you will, if you are careful, reduce it to several minutes *without a single question with that apparent object.*

What time had he finished selling?

He sold the last pen just before one, all in good time for the "ornary."

Things fetched a goodish price that day, he tells you, and you get out that *towards the latter part of the morning the market got a little brisker like*, and

he, being as shrewd a man as any in the place, had reserved a smart deal of stock till the last, *so that between eleven and one he was pretty busy like*. And there not being much chaffering about the price of the horse, as you know there seldom is when a rogue buys who doesn't mean to pay for it, the thing's done, bless you, and the prosecutor too, both by the thief and your learned self, in a few minutes; before he has so much time as to observe *whether the man had blue or grey eyes, a brown neck cloth or a white one, a light grey overcoat or a shooting jacket:* how *could a man after three years*, he plaintively observes, almost weeping, *be expected to give the color or shape of a man's coat, or even tell whether he had brown or grey whiskers or any whiskers at all?* he couldn't tell you the color of his own necktie or coat on that day. It's not to be expected.

"*Unpossible*," he says "*my lord*."

Poor soul he dosn't think what he's doing, and that he is being turned into as good a witness for the defence as it is possible to have. The learned counsel knew full well that there was not a question he put to this witness that he *could* answer, try as he might. And further, he has not put one question which, answer as the witness liked, or refuse as he liked, *but would have been in the defendant's favor*.

Let us take any one. Suppose he had said the man who cheated him *wore a beard*, but added that *he had shaved it off* since. His case must have been over, if you couple that fact with another fact, namely, that *he had never seen the prisoner before*

or after the occurrence. So of every question; the answer, if near the mark, would have been a *guess*, and if he could not even guess, his evidence was destroyed. But if you want to pound the poor man still more it is possible to do so. Just try the effect of this upon him:—

Can you tell me, without looking at the prisoner, what is the color of his eyes?

He certainly cannot; and although he turns instantly to the prisoner, the prisoner as instantly turns his eyes modestly to the ground, so that no information is to be got from that quarter. Now then, as you know perfectly well that the witness has been trying to get a sight of the prisoner's eyes, and had not directed his attention to his necktie or waistcoat, you may safely and suddenly ask him about either or both of those articles, and you will find that he cannot answer you. Notwithstanding all this, if you really desire to show how utterly worthless such evidence of identity is, you may do a great deal more than you have yet done. But what I am now about to indicate requires some skill and judgment in framing your questions.

Be careful you do not get an accurate portrait of the man made up partly from his own clumsy description to the police, and partly by the description of the man to the witness by the police.

I cannot put down questions here which would be a safe guide, because I should like first of all to see the witness, for it would depend upon the kind of man he was as to what question should be put first

on this subject. Further, I should like to know from the police-sheet containing the report of the robbery (and which is not evidence unless you make it so) *what kind of description was given of the thief by the witness immediately after the swindle*, if any description was so given. But be sure of this, that if he has given one *which does not tally with that of the prisoner, it will ensure an acquittal.*

I need not add that a cross-examination of the kind indicated, when the case depends entirely upon the prosecutor himself will be certain to break him down and obtain for the swindling rascal the "*benefit of the doubt*," which is a doubtful benefit to society, notwithstanding society's love of fair play.

By way of contrast to this effective cross-examination, I will give an illustration of one not so effective. It will show the danger of being too minute and circumstantial, the usefulness of a judicious re-examination, and how such re-examination may be admitted through a very small opening.

Let it be remembered that this is another instance of the advocacy of leading men, whose experience seems to have innured them to danger, showing, as I take it that something more is required in advocacy than mere practice to make perfect. The circumstances arose in a case where the validity of a will was the question in dispute. On the one side the testator was alleged to have been perfectly capable, and by the other side was perfectly incapable, of understanding the nature of the act he was doing.

Eminent advocates and hard-swearing witnesses abounded on both sides.

One witness swore that the testator, in his opinion, was of sound mind, memory and understanding. He gave his evidence fairly, and seemed desirous of establishing the will.

He was then cross-examined in the following manner:—

"I believe you were related to the testator, were you not?"

"I was."

"Nearly related?"

"Yes."

"And would have an interest in the will if established?"

No objection seems to have been taken to this question, which was very near speaking to the contents of a document which was not read.

The answer was "Yes."

If the advocate had asked nothing further, it was a good point made, and certainly would have materially affected the value of the evidence as to the soundness of the testator's mind, because the witness had *a direct interest in establishing the will*. But in spite of the remonstrance of his junior, the leader continued his cross-examination, and asked—

"Would you take as much as ten thousand pounds if the will were established?"

"I should," said the witness; and, as the newspapers reported, "there was profound sensation in Court."

Of course, if matters could have remained here, the profoundity of the sensation would have been permanent; but the watchful counsel on the other side quietly remarked:—

"Just one question. Have you make a calculation as to what you would be entitled to in the event of an intestacy?"

"I have."

"What would it be?"

"As next-of-kin I should be entitled to *fifty thousand pounds.*

Cross-examination not effective, *except* for the purpose of letting in this fact, which let in the will, and also let in to a considerable depth the cross-examinating counsel. This almost seems incredible; one of the frequent characteristics of truth. There are so many mistakes made by experienced counsel that one sometimes doubts whether practice really makes perfect: if it do not, I will affirm that careful study of human nature will bring you much nearer to it than any amount of so called practice, which often is nothing more than physical exercise.

Merely shooting at a target is not much, but the careful study of the rifle, the amount of pressure required on the trigger, the direction and force of the wind, the state of one's nerves on the occasion, the clearness of the atmosphere, the "pull," and other trifling matters, are a good deal, and no one will excel unless he study them.

A man by nature may be an advocate; he cannot become one by practice; but he may perfect his

natural gift by careful study of the motives that touch the springs of human action. You may not be able to learn much advocacy in a Court of Justice, but you may learn a good deal in the market-place, on the race-course, and at country fairs, especially "Goose Fairs."

CROSS-EXAMINING TO THE CREDIT OF A WITNESS.

This is always a dangerous, and too often a disastrous and cruel performance. None can do it gracefully or approvingly. It exhibits generally a weak case and a malignant mind. For, mark, whatever questions are put are not the inventions of the prolific genious of advocate, but *are conveyed to his mind by the client, who will ultimately, if they fail to demolish the character of his opponent, have to pay for the luxury of them.* The advocate is responsible for the use he makes of his instructions, not for the instructions themselves.

"How is that revelant, Mr. Jones?" asks the judge by way of remonstrance, as Jones is unlimbering his Gatling for the purpose of pouring it into the witness's character, loaded as the fieldpiece is with all the errors and supposed errors of the witness's past life that could be collected or invented against him.

"Oh, my lord," says Jones plaintively, as though he were unkindly interrupted in the performance of an act of mercy:

"It goes to the witness's credit."

"Oh," says his lordship, and then the jury just tap the ledge of the desk with the tips of their fingers—and a good deal of meaning there is in those taps:—take care, Jones, the gun may burst! Jones might have added, "My lord, at present my client has only succeeded in breaking up the witness's home; he is now about to ruin his character: it may be to make his children hate and his wife despise him!"

"Ask him," says a money-lending plaintiff in a bill of exchange case, "*whether he isn't a Jew?*"

"But," says the counsel, taken all a-back at the suggestion, "what does that matter?"

"It will *prejudice the jury* against him," says the plaintiff.

"But you are a Jew, sir?"

"Yes but the jury don't know that. I am not a witness."

This is the usual spirit in which counsel are instructed to cross-examine "to the credit of a witness," and I need not say a cruel one it is. Spite and malice are generally the moving springs of *that* species of attack.

The greatest mistake an advocate can make is to let his client dictate to him the mode in which his case is to be conducted. Either use your own judgment, or resign your duties to the hands of the gentleman who desires to conduct your case. You cannot drive a coach with your back to the horses.

There was a famous case not long ago which is

extraordinary in many aspects. Extraordinary for the way in which experts swore; extraordinary for the enmity which was exhibited by some of the partizans as well as the defendant; extraordinary for the mode in which the character of the plaintiff was assailed, both out of Court and in.

There was no defence to the action: could be none when plain common sense was brought to bear upon it. There was no defence when the law was brought to bear upon it.

There should have been an apology and a retractation; but you may always defend some actions, even though there is no real defence. The point I am about to direct the attention of the reader to is the attempt to destroy the plaintiff's character in an absolutely undefended case, and the consequences resulting therefrom. You may be sure that juries will make you pay for unfounded attacks upon witness' characters. They invariably take the *advocacy* of the cause into their reckoning with the cause itself, and no one has power to prevent it. Try to reduce damages if you like, but you will find it difficult to reduce them on the ground that you aggravated your original wrong by abusing the plaintiff. Human nature has not yet been tutored by fierce advocates to put out of its calculation the injury done to a plaintiff by the defendant's *mode* of attempting to escape a just liability. You may injure your adversary more by firing at him in your retreat than you did in your first attack. This

will be taken into account by the jury, although it forms no part of the original claim.

The extraordinary case I allude to was an action for libel. The plaintiff was asked in cross-examination whether he had not committed theft and forgery. The charge was indignantly denied. There was, indeed not a shadow of foundation for such a charge. I wonder why, after this, he was not asked whether he hadn't murdered his mother. He could but have denied it.

After some considerable time the defendant went into the box to prove the truth of the libel; *and by way of clearing up* the matter of charge of theft, and forgery he was asked, as a sort of "By-the-by, Mr.——— now you are in the box we may as well dispose of this little matter about which there seems to be some little misapprehension."

That was the tone of injured innocence, assumed in consequence of the plaintiff denying that he was a forger. Observed the learned Queen's counsel:—"Something has been said about the plaintiff and a cheque. I don't want to make too much of it, but *for his sake* it ought to be cleared up."

Such kindness, I need not say, verily received its reward.

"Oh, yes," says the defendant, "I remember."

"You remember?" repeats the counsel.

"Oh, yes; quite well," says the witness.

"We may as well clear it all up. You had a cheque, had you?"

"Yes."

"Where did you keep it!"

"In my desk."

"And what happened?"

"I suppose he took it, and signed it——

"Did you authorize—ah, well!—you don't wish to go into it?"

"Oh, dear no!'

Poor man, he little thought he was already "into it" to the depth of four or five thousand pounds!

Counsel sits down.

"Now," says the junior on the other side, in true Ciceronian style, "just attend to me. Have you talked this matter of the cheque over this morning?"

The witness never expected this question any more than his counsel did; but it was just *the* question to put, and the only one that could have the effect it did. But what is the witness to say? He *must* answer "Yes."

"Did you talk it over with your solicitor?"

Bound to answer "Yes."

And *was it arranged that you were to be asked the circumstances of this alleged robbery?*"

No other answer than "Yes" can be given.

It was *not* an accidental thought of the learned counsel you see, but a planned and deliberate renewal of the attack upon the plaintiff's character.

Thus literally in the *interest of the plaintiff*, was it cleared up at an expense of *some thousands of pounds* to the defendant.

It may be as well to give the opinion of a distinguished writer on this subject.

The late Charles Reade, in a letter to the *Daily Telegraph*, entitled, "The rights and the wisdom of Juries," says with reference to the defence:—

"Right or wrong, they found some injurious exaggeration in the original libel, and much *malicious exaggeration in the defence*, which the defendant selected. Now, all juries argue backwards, from the animus of the defence to the animus of the original libel, and they have a right to do so. As to damages, here I drop conjecture, for I think I know the grounds on which they settle them. *They decupled the damages because the defence centupled the libel.*"

The mild issue of "*thief or no thief*," was suggested, and the plaintiff was tortured, yet cleared. Where was his remedy for this attack? It was in its nature indictable, yet he had only the jury in this suit to pity him and to compensate him. God forbid that the defendants in libel should be encouraged by trumpery damages not equal to the plaintiff's costs, to stab another in so holy a place as a temple of justice, with any irrelevant dagger the ruthless hand can furnish to the passionate, and therefore remorseless heart.

The defendant selected his own defence. He could have resigned the verdict, and reduced the costs and damages to a trifle. He preferred the bold course though he and his counsel knew it was the perilous one.

Mr. Read speaks of the dangers of such a mode of examination from a point of view different from mine; he regards it from the public standpoint and

as a malignant attack by the defendant himself. I look at it from the advocate's position only.

Subsequently, on a motion for a new trial, the whole blame for putting the offensive question was bravely accepted by the defendant's counsel. The blame doubtless may so be appropriated, but it could not be shifted from the defendant, who told the learned counsel that the plaintiff was a forger and a thief. The original libel could not be appropriated by any number of counsel, nor could the subsequent slander. It was not *invented* by the advocate, and the advocate could not be punished for it. To relieve the defendant from the consequences of the slander, without paying the penalty, was only making matters worse, because it was an attempt to avoid the pecuniary consequences which must ensue.

An advocate cannot take the blame of his instructions, he can only accept the responsibility of acting upon them.

It is unquestionably right sometimes to attack private character; *but* you must be sure of your ground, and skillful in your mode of performance. Time and circumstances must be taken into account.

Suppose a murder had been committed at a house of "ill fame," do you think it would be useful to ask the keeper of it whether he had ever been convicted of keeping such a house? It would be absurdly inconsistent with the nature of the inquiry. but if such a witness came up to give evidence of another man who was indicted for keeping a house

of that character, the question then would be all important, as it would throw light on the *motive of his evidence*, and absolutely destroy any value it may have possessed. Don't imagine that you are always advocating your client's cause because you are putting questions or making speeches. You may ride on a rocking-horse all day long and fancy you are hunting, but such a performance, however creditable to your imagination, will say little for your judgment.

CHAPTER XV.

CICERO'S DEFENCE OF ROSCIUS FOR MURDER.

"Now," says the reader, as he glances at the heading of this chapter, "I am on familiar ground. I knew Cicero before I knew 'The house that Jack Built.'"

"But still," I meekly observe, "You will agree with me that there is more of 'The House that Jack Built' than Cicero, in many of our modern trials. Otherwise how comes it to pass that simple cases with a single point last a fortnight, three weeks, or three months? Are judges less learned or juries more stupid than they were? By no means. Counsel have improved in their wind of late years, and clients seem to have greater facilities for raising it. But for 'The House that Jack Built' how comes it that in a civil case you may have the plaintiff on his trial for forgery, the defendant for libel and the witnesses for other crimes? How comes it that

learned leaders wander away into the regions of "railing accusation," instead of keeping to the homely paths of fact that lead direct to the issue? This is the fault of the shepherd boy who leaves his sheep to chase a butterfly or climb a pollard to see if there is a ghost in its hollow. What of pursuing character when you ought to be wrestling with facts and probabilities? Is a suggestion of forgery an answer to an action for breaking the plaintiff's leg? That was not Cicero's style. It was no matter what path he travelled, or if he were in a wilderness without a path, his art ever pointed to the issue, and straight was the course he made for it. No butterflies and no ghosts in hollow trees for him; he dealt with hard, substantial facts and visible probabilities.

But now let me ask the reader, whose intimate acquaintance with Cicero is of so long standing, what are the lessons in advocacy the great master teaches? He does not teach eloquence, for that has never been taught since the world began, any more than poetry has been taught. He taught many things which ordinary minds can grasp. But what he teaches he also learnt. One can see that he studied *order and arrangement*, human nature in its complex and beautiful mechanism, its passions, prejudices, and its innermost sources of action; he learned to measure its strength and to probe its weaknesses; he knew its ailments, and their proper treatment. He did not appeal to the passions when he had to attack prejudices; and where human

weaknesses invited his skill, he did not waste his energies in higher conflict.

The whole of Cicero's speeches are constructed on the same lines; and, advocacy in the humblest branches constructed upon those lines, will achieve marvelous results. You will perceive in all the great advocate's speeches the same symmetrical proportions, the same mode of construction, and if I may be permitted the expression, the same elevation of surprising beauty.

One has known voluble speakers hammer away at a case regardless where the blows may fall. There was a waste of strength here, and a mis-directed energy there, which you never detect in Cicero. A general onslaught is not the way to attack the case made against you. Cicero does not pour a shower of platitudes on the surface of a case, otherwise it would be like a wave dashing itself upon a rock—it would roll back but the rock would remain uninjured. He attacks a *single fact* or an *improbability* at a time, and never leaves it till he has destroyed it if destruction be possible. He does not attempt to remove at once all the stones in an arch, but the Keystone only, and if he is successful there he leaves the rest to fall.

He knew that many strong facts may rest upon a weak one: to the weak one then he directed his efforts. No fact in a case can stand alone; if it be not attached to another fact, it will and must disclose an improbability. It is the improbability in that case he belabors.

We approach the perfection of speaking when an advocate, skilled in his art, without witnesses, successfully attacks an apparently strong case that has been made against him. He is thrown upon his own resources. Facts are proved, so far as evidence can prove them, and it is a noble task to demolish them by argument. There is something more here than fighting a compensation case, in which, usually, there is about as much art required as there is in a well-organized wrangle between two accountants' clerks.

The speech for Roscius, though not to be approached for its eloquence, is the line upon which, consciously or unconsciously, are framed all successful defences. I say unconsciously, because, without studying the particular model, the same art is exhibited where the advocate has any knowledge of human nature and any skill in argument. Where you have no evidence the facts on the other side can only be met by argument, and argument must proceed upon their improbability. That is the key. But to show the improbability requires a carefully trained mind, educated in the motives, the passions, the weakness, the cunning of human nature. Let us test these observations by a short examination of the defence in the case before us.

Roscius was charged with the murder of his father. The case, according to our modern and enlightened view, would not present any great difficulty. I know many juniors, and one or two leaders, who could have got Roscius off had he been tried at the Old Bailey. But the difficulties of the case are

not to be judged by our modern system of criminal law or criminal procedure, and indeed are nothing to the point in the matter of dealing with the case. If it had been ever so difficult the line of argument would have been the same, although the result might have been different. What then was the nature of the defence? I pass by the skillful apology which Cicero makes for appearing in the case at all, and the means he takes to impress the judges with the difficulties of the task, in consequence of the nature of the Government he indirectly attacks and charges with tyranny. He goes directly *to the motives which influenced the prosecution.*

Suppose these motives had come last instead of first in the order of his speech, their effect would have been nearly lost, because they could not have a retrospective effect so strong as to impart a color to his past arguments. In placing them first they followed the speaker, and gave strength and effect, force and distinctness to every word he uttered.

The motive is that Roscius may be got out of the way in order that Chrysogonus, the Director of Rome, may enjoy the estate which belonged to the father of the accused: and Cicero asks that this may not be permitted, and he asks this, not merely in the interests of his client, but he extends his advocacy and makes his cause the *liberties of his country*, which would not be safe if such a prosecution were successful. The judges themselves, therefore, by this stroke were placed on the side of the defence.

So one sees what powerful arguments may at times arise from an investigation of the motives which inspire a criminal prosecution.

If the motive of the prosecutors be avarice or plunder, it follows that the judges are asked by them to become instruments of plunder and avarice by enabling the movers of the prosecution to carry out their object. A judgment adverse to Roscius would give them legal possession, so the judges are in fact insulted by the prosecutors. Good knowledge of human nature here, and marvelous skill in applying it!

Now comes a history of the father of the accused. His character and position are described; and differences between him and the two Roscii of Ameria are glanced at.

Then it appears that while the accused, who was a farmer, was at Ameria, attending to his country affairs, and Titus Roscius every day at Rome, the old man was murdered as he returned one night from supper, a circumstance which Cicero hopes will give a pretty good intimation *of the persons against whom the presumption of guilt is strongest.* Probabilities again. So that what with motive and what with presumption, he starts very fairly on his course; for, given motive and presumption you go a long way towards awakening suspicion, and suspicion cast on the prosecution is a strong auxiliary in a defence.

Now he arrays the circumstances of suspicion or rather of that presumption which awakens suspicion

against the prosecutors. After the murder, a creature and dependant of Titus Roscius, within a few hours, having travelled fifty-six miles in the dark, brings the news to Ameria, and tells it, not to the son, but to his enemy *Titus Capito*. Four days after, the news is brought to *Chrysogonus*. Then, not to take up the time of the Court, a consideration in those days if not in ours, these disinterested parties *enter into a confederacy*.

Now comes the account of what the confederates did. Chrysogonus buys at an auction the estate of the deceased man, who was entirely devoted to the interests of nobility. Capito takes three of the best estates, while Titus, in the name of Chrysogonus, seized the rest. Things fetched apparently very little at the sale—£50,000 worth commanding only a few pounds. In the meantime the worthy Titus, the agent of Chrysogonus comes to Ameria and seizes the estate of Cicero's client, drives him naked, my lords, from the house of his father, the seat of his ancestors, and the altars of his family; he took many effects openly to his own house and *secreted* others, lavished some upon his confederates, and sold the rest by auction.

No wonder the people of Ameria wept. The poor son, the accused, was left in poverty, and these great men enjoyed his property! There was not a man who would not rather have seen the whole party writhing in flames than this Titus swaggering and domineering in the spoils of the excellent and virtuous Sextus!

The inhabitants of Ameria, therefore pass a resolution, and a deputation of ten was sent to Lucius Sylla to tell him of the character of this *Sextus Roscius*, and to complain of the wickedness of these confederates, and to beg his interposition on behalf of Sextus' poor son. Then Cicero asks leave to read the decree. Sylla, he is careful to impress upon their lordships, knew nothing of the transaction. The deputation never reaches Sylla. Chrysogonus shuffles and promises to resign the estate to the son, and Titus promises most faithfully to join in this so fair undertaking. But they delay the performance from day to day, and at last, beginning to feel they were not in possession of a good title, they *enter into a conspiracy against the life of Cicero's client.* But poor young Roscius flies for protection to a lady who had been his father's patroness. She succors and protects him, and then they have recourse to the guilty device of impeaching him of the murder of his father! They secure a hardened impeacher, and as they knew they could not prove him *actually* guilty they resolve to make him *politically* guilty. They think that the power of Chrysogonus would prevent any man from coming forward to defend him against so foul a charge as parricide; but apparently they did not know the courage of the young advocate named Cicero.

After showing thus the nature and motive of the prosecutors, the learned advocate asks where he shall begin by way of meeting the charge. The answer

had better come from himself, for no one can answer like Cicero.

He begins by depicting the unhappy event of the barbarous murder, and says they improve on that wickedness by bribing witnesses to accuse the son, with his own money! He asks what is there that requires to be defended? He will examine the whole matter, so that the Court will have *a clear comprehension of the circumstances upon which the accusation lies, of the points to which he is to speak, and of the manner in which they ought to decide.*

Cicero comes now to the *charge*, the blackest of all crimes, requiring to be *strictly proved beyond even facts*, for it must be shown that his whole life has been one of consummate guilt. This would not and could not be shown in an English Court, as the reader is aware, but the converse could. A good character would be placed by a skillful advocate *immediately after the charge*. What is the charge? Who and what is the prisoner? So that Cicero here, as on all other occasions, is true to the highest art. He not only shows that the prosecutors can say nothing against his previous character, but he goes on to show everything by way of argument, to be afterwards supported by evidence, in his favor. And it may here be mentioned that it is open to the prosecution in our own day to prove the bad character of the prisoner if his counsel gives evidence of character in his favor.

Cicero, never forgetting that all crime proceeds from motive, places motive in the forefront of his

argument for the defence. It must come after character, because if the character be good, there will be the less *probability of there being any motive.* It is its natural place, and Cicero never puts anything out of its order. Here, in arguing that there is no motive, he deals with two improbabilities in their order. First, the improbability that without very strong provocation a son should attempt the life of his father; and, on the other hand, the improbability that a father should hate his son without weighty and indisputable reasons. Both these points are argued upon the basis of the character of father and son, upon the circumstances attending their business and social relations to each other, as well as upon the general practice and habits of society with reference to their mutual dealings; and he does not leave this subject till he has examined it from every point of view and left nothing further to be urged.

It was said by the prosecutors that the father of the accused *intended to disinherit him*, and that caused hatred.

"If so," asked Cicero, "for what reason? *Did he do it?* What prevented him from doing it? and did he ever mention such intention?"

A safe question *after* the statement made by the prosecutor. Having shown that the charge of parricide is brought without a suggestion of motive, he says that the prosecution should be abandoned, but for once he will forego his right to demand it, and being so thoroughly satisfied of the innocence of his

client, he addresses himself to that part of the case which would come next in order if the least suggestion of motive could have been made.

He now abandons the argument based on motive, and asks *how* the murder was committed? He not only asks the question, but answers it, and *deals with every possible answer that could be given.* If it is said the accused did it with his own hand the answer is complete *he was not at Rome at the time.* A good *alibi* can be proved. If it was done by others, were they slaves or free? Were they of Ameria or of Rome? If of Ameria let them be produced; if of Rome how did this country bumpkin know Roman cut-throats? he who had not been at Rome for years. If he met them to arrange the murder of his father, where was the place of meeting? If he hired them to whom did he pay the money? where did he get it? and what was the amount? These are awkward questions, but they refer to circumstances that usually accompany justice when she is in pursuit of a criminal. And they were the more awkward to answer, inasmuch as the prosecutors had affirmed that *Roscius was a country barbarian, who held no intercourse with the human species and never set foot within a town.*

Cicero does not readily abandon this line of argument: it is too precious. Truth wooes him with too fascinating a smile of approval, and he proceeds; taking their own description of the country clown, and working upon it with imperturbable pertinacity. he asks, as Roscius was at *Ameria* when his father

was murdered at Rome, he *must have written to some assassin there or sent for one!* But this involves the employment of intermediate agents, not one of whom can be traced or *even suggested by the prosecution.*

If not committed by free-men the murder was perpetrated by slaves. But the prosecution will not allow the slaves of the accused to give evidence, which is a good argument in favor of the defence; and, moreover, these slaves are *now in the service of Chrysogonus*, pampered and rewarded by him—not to give false evidence against Roscius, which it would be impossible to do with success in the presence of such a cross-examiner as Cicero, but *to suppress that evidence which would have cleared his client.*

Now, then, my lords, having traveled thus far, whom do you suspect? What inferences and suspicions arise from all these arguments? Roscius is reduced to poverty by his father's death, and he is not permitted to inquire into it. The prosecutors, who are known to live by deeds of bloodshed, have possessed themselves of the property of the deceased man.

Now is the time to state an *alibi;* and having thus far refuted the charge he considers it advisable not only to acquit his client, but absolutely to purge his character from the charge *by showing who did it*, or by raising such presumptions of guilt that all the world shall fix it upon his persecutors. He is to show the murderers, the confederacy and the con-

spiracy; and he warns the judges, with a touch of exquisite skill, *how many presumptions are necessary to establish a single fact.*

He begins by saying that they can find no motive in *Sextus Roscius*, but that he can find a motive in *Titus*. If so, that is a good foundation on which to build his presumptions. The motive stands out clearly enough—it was plunder. The man who was poor before the murder *becomes rich after*, and rich with the estates of the deceased. Then the prosecutor, who thus gains by the murder, was a man who bore an *inveterate hatred to the deceased man.*

The motives being thus established, he next inquires whether there was in the case of Titus that which he proved did not exist, so far as could be seen, in Sextus namely, *opportunity*, and this is shown beyond the shadow of a doubt. He was at Rome when the murder was committed; that is one circumstance, but we need more. Others were at Rome besides Titus. But this gentleman was acquainted with bands of assassins who murdered that those who employed them might become possessed of their property.

Next, what did Titus do after the murder? He *struggled to become the accuser of Roscius.* It was his friend and dependent who *brought the first news* of the murder to Ameria. Did this messenger and friend do this of his own head? If so what concern had *he* in the matter? And why did he go to Ameria with the news? And why did he go to Titus Roscius Capito first of all, instead of to the unhappy

family of the deceased? Then see the expedition with which this messenger carried the news! *How did he come to hear of it so soon? He must have heard of it the moment after it was committed.* And from these facts it follows that both Titus and the messenger *were present at the murder.* Furthermore, the news being taken to this *Capito*, who shared with Titus the plunder, the whole matter is as clear to the minds of the judges as if they had stood by and seen the murder committed.

The subsequent acts of the conspirators are next referred to; such as sending the news to Chrysogonus, the hurried sale of the estates, and the sharing amongst them of the property. Next, the suppressing of the evidence which the slaves could give, is strong presumption that it would be, not only to the advantage of the accused, but to the ruin of the accusers, if they had been permitted to be examined.

Now all this seems very simple indeed. So are nearly all the great works of art when closely examined. Art loves simplicity, and nature abhors complications. It is inartistic Ignorance that muddles, and Pettifoggism that complicates.

I have often heard it said that "Cicero would not do now." I answer, Cicero would have been the greatest advocate of the day, because he was one of the finest speakers, and constructed his defences and his prosecutions on the truest lines. Nor is there, even now, nor has there ever been, any other mode

than that adopted by Cicero of properly conducting a case.

Mr. Bagpipes may suit our age better; but, if so, it has marvelously degenerated in everything that pertains to real oratory and true advocacy. Cicero was a good speaker, which Bagpipes is not. How, then, can it be said that bad speaking will succeed and good speaking fail? Why will not good speaking do now? But Cicero was also a common sense advocate, which Bagpipes is not. Why, then, if Bagpipes succeeds should not Cicero? Can it be said that the people are less intelligent than they were in Rome in the days of Cicero? But further, Cicero constructed his cases on the truest lines of advocacy; Bagpipes has no constructive faculty, and does not construct his advocacy at all. His speeches are but a confused torrent of commonplaces,and his cross-examination but a haphazard flinging of questions at a witness, with the bare hope that some one or other may hit something or somebody.

Our tribunal, no doubt, is different from the one Cicero addressed; the law, the political situation, the habits, manners and institutions of the people are all different, but human nature remains unchanged and unchangeable, and so does the true art of appealing to that nature.

Did the reader never preceive an almost perfect likeness between a parent and child? the same expression of face and tone of voice, the same smile upon the lips, the same twinkle of the eye, when the features of the one bore no actual resemblance to the

features of the other? If so, he has seen the likeness which exists between the true advocacy of to-day and the advocacy of Cicero.

CHAPTER XVI.

THE STORY OF THE TICHBORNE CLAIMANT.

ANALYSIS OF MR. HENRY HAWKINS'* SPEECH FOR THE PROSECUTION IN THE TICHBORNE CASE.

As the object of telling a romantic story differs from that of narrating a series of facts in Court, so the art is different. The interests also are of an opposite nature. The object of the former is to entertain without any regard to your belief, while the latter is to impress your belief without any view to your entertainment, except that an artistic advocate will take care to rivet your attention by the

*Now Sir Henry Hawkins, and one of Judges of the High Court of Justice, of England.

entertaining manner in which he unfolds the incidents of his story; but he will not amuse you at the expense of his cause, or excite your imagination to the detriment of your judgment. The interest he excites is in the reality of the facts he intends to prove; the charm of the novelist depends mainly on presenting fiction, so that it resembles reality. The emotions are stirred by imaginary incidents, and at the emotions his art stops. The advocate, on the contrary, if he awakens emotion, does so only the more surely to reach your belief, and when he produces a striking situation it is but for the purpose of impressing its incidents.

The novelist and the dramatist strike a situation in order to heighten the entertainment. I do not say that the advocate will not sometimes waylay you with surprise, but when he does so it is still with the object of fixing more certainly your belief.

If these observations be true, it follows that the mode of unfolding a story containing many striking incidents will be different in the two artists. The novelist may commence where he likes, *except at the end;* the advocate will generally commence *before* the beginning of the actual drama; that is to say, he will state the charge, if it be a criminal case, and the nature of the action, if it be a civil cause, before he comes to the incidents of the story.

In the case now before us I have nothing to do with its merits, but only with the merits of the opening speech, and with them only so far as the skill in its construction is concerned. The mechan-

ism of the speech first, and the mode of presenting it next. But what an ample field for criticism stretches out before us as we cross the borders of this amazing case! On every side are incidents innumerable that have to be collected, collated, separated and arranged. It is a wilderness of facts; those in the far distance bearing a near relation to those that are close at hand. Circumstances apparently unconnected have the closest relation to each other; truth and falsehood are intermingled in the wildest confusion; ignorance and imbecility, prejudice and fraud, overlay and smother minute incidents of overwhelming importance, and even twist and distort facts that can neither be hidden nor destroyed.

The panorama of a long series of years has to be brought before the jury. To unfold it with the art of the novelist would be to produce thrilling and extraordinary effects exciting wonder and sympathy; to perform the task with the skill of the advocate will be to fix the belief of the jury without any regard to their emotions. The former would draw from the reader the exclamation "Wonderful!" The latter must excite the jury at every stage of his progress to say "Impossible!"

The case was opened as simply and as dramatically as anything I have ever listened to; and, reading the statement as I do now after many years, it reproduces in my mind all the excitement and wonder which I so well remember to have experienced when it was delivered.

In the first place it is noteworthy that there need be no waste of words in the exordium of this "momentous case," although the jury are told that "the defendant is charged with a crime as foul as Justice ever raised her sword to strike, and that the public interests demanded the protection of the innocent as well as the punishment of the guilty." That is enough, and then comes "the substance" of all the great mass of facts which will have to be stated.

It is said in few words, and to this effect: In April, 1854, Roger Tichborne, the heir to the Tichborne baronetcy and estates, embarked at Rio on board the "Bella," which was lost, and for eleven long years nothing was known or heard of him. Suddenly, in Australia, a butcher came from the shambles and announced himself as the long lost heir, and in the legal proceedings which were instituted by him for the recovery of the estates, he swore falsely many things in support of his claim, of which these are the chief:—Of course he swore that he was Roger Tichborne, the son of the last baronet. In support of the story which he told he also swore that he had, while on a visit to his uncle, seduced his cousin Kate; and, it being suggested to him that he was Arthur Orton, the son of a butcher at Wapping, he swore that he was not. These three things he falsely swore, and those are the three main charges against him."

"Such is the outline of the fabric of that gigantic fraud which it is my duty to unfold to you, and

now I proceed to state the story of the life of Roger Tichborne."

This is enough to tell the jury as to the charge. Now come three things necessary to clearly define, because identity or non-identity in this case is everything. If this be Roger Tichborne we shall find some likeness to his former self in his *education*, *character* and *mind*. We shall also find some knowledge of the incidents of his past life and his connection with bygone and living persons. So, if the jury are acquainted with Roger Tichborne's early life, they will see whether this man is *likely* to be he—likely, that is all, so far as these details are concerned; probabilities ever asserting their influence, as they always do in true advocacy. The main incidents I shall give because many students will, I am sure, find them interesting as a story as well as instructive as a piece of advocacy, who would never wade through the Tichborne trials in the newspaper reports of the time.

We are told that Roger was, in his earlier years, educated in France; that he occasionally visited this country; and that his education was continued at Stonyhurst. Then came many details of the early incidents of his life, and as to his habits, manners and pursuits; told, says the learned counsel, in detail, *because they had been denied by the defendant* in his cross-examination, while endeavoring to support his claim to the Tichborne title and estates. Of course, if he is well caught in a good many lies hereabouts, it will go far to shake his character in

the eyes of the jury for veracity. It was not omitted to be stated that Roger had been tattooed on the arm, which was to be proved by Lord Bellew; a good point, of course, in an individual's likeness to himself, because, although features change and waists enlarge, tattoo marks remain about the same "through all the changing scenes of life." Rogers's good French was mentioned, as also his bad spelling in English, but a kind of spelling, which *would be peculiar to a boy who had spent his early days in a French school*, and by no means likely to be acquired in a butcher's shop at Wapping.

So that there was a pretty good likeness of the outward boy on the mind of the jury so far as his habits, customs and manners were concerned, before the learned counsel proceeded to give a likeness of his character, including his heart and mind.

Roger entered the army and fell in love with his cousin Kate. To show his mind on this subject many letters were read "*to convey to the jury a thorough knowledge of this young man's character and ideas*," his way of thinking and style of writing, because the learned counsel would have to contrast these letters with those of the defendant. Not a bad test of likeness or unlikeness this between two minds, if two minds they were. We are next brought to the turning-point of Roger's life—his uncle's discovery of his attachment to his cousin and his disapproval thereof. In consequence of this, on the 12th of January, 1852, he left Tichborne Park, where he was then staying, and wrote in melancholy terms of his

intention to go abroad for ten of fifteen years. In that month he confided to a Mr. Gosford, in a "sealed packet," his instructions as to certain matters in the event of death.

The jury are asked if it were possible that such an event could be forgotten? They were then enjoined to bear in mind certain letters to Kate which were couched in the strongest terms of affection. In answer to a letter from Lady Doughty he wrote a warm epistle expressing his affections for his cousin. After spending a few days with his relations in town he visited them in Hampshire. Whilst there "he gave his cousin a document dated 22nd June, 1852, the duplicate of which he said he had deposited with Mr. Gosford in the sealed packet. That document Miss Doughty had preserved to this hour and she would produce it to the jury. It was a short statement—only four lines—*a promise to build a chapel at Tichborne if he married his cousin within three years*. And from that hour to the present she has never seen Roger Tichborne. This, I pledge myself to prove to you by overwhelming evidence. Never forget the facts and dates I have now stated; they are of vital importance in this case. Could such facts ever be forgotten by Roger? He went to Tichborne no more; he went to Upton, near Winchester, in the autumn of 1852, to hunt; sold out of the army January 6th, 1853, and in February went to Paris to take leave of his parents, who were living there; left with his mother a lock of his hair, and returned to England. Leaving Mr.

Gosford a power of attorney, on the 25th February he left London for Southampton, accompanied by Gosford, who took leave of him at Winchester. On the 4th March he sailed from Havre for Valparaiso."

Now the wanderings of Roger are traced by the aid of maps in South America. Dates of arrivals at different places, and departures, are given with a view of falsifying dates given by the defendant in the former trial. After making a tour in the interior, Roger returned to Valparaiso, stopping on his way at Lima, where he engaged one Jules Berand, who would be called to give some important evidence. From Jules Berand he purchased certain curiosities, especially a little skeleton which Roger sent over to Gosford, and which would be produced. It was produced on the last trial, and Mr. Hawkins says he shall have to call particular attention to the evidence given on that trial by the defendant concerning this "little skeleton." It may be big evidence, although a small skeleton.

At the end of December Roger was at Santiago making preparations for a tour in the mountains.

While there two daguerreotype portraits were taken one for his mother and one for Lady Doughty. Of this there could be no doubt, as he refers to them in a letter to Lady Doughty written in February, 1854.

In January he left Santiago for his tour in the mountains. On the 13th February he arrived at Buenos Ayres. Thence he went to Rio and engaged a passage on board the *Bella* for New York. He had, in the meantime written many letters to his aunts,

Lady Doughty and Mrs. Seymour, and to Gosford. These will be produced, and important evidence, the learned counsel says, they will be, "because they are the evidence of Roger Tichborne himself." *In not one of these letters is Mellipilla mentioned, nor the name of the family of Castro*, with whom the defendant swore he spent three weeks. In one of these letters, too, he says he had heard from Lady Doughty of the death of his uncle, the baronet, by which the baronetcy and estates descended to his father, and he himself became next heir.

Of vast importance, too, says Mr. Hawkins, is the fact that, in one of his letters, he alludes to his "*daily journal.*"

Another fact of importance was that, on the death of his uncle, he became entitled, under the settlements, to £1,000 *a-year;* and he wrote home about it, and asked that, "as my income has increased since my uncle's death, pray go to Messrs. Glyn's to exchange the letter of credit for £2,000 for three years for one for £3,000 for the same period." This is considered important as showing *the intended period of his stay abroad.* It is dated Lima, *September 11th*, 1853, and is addressed to Mrs. Slaughter.

Next come letters from Buenos Ayres and Monte-Video in March 1854, in which he says he is "fond of this kind of life," intends to visit other parts of South America and then proceed to New York. On April 1st he wrote his last letter, so far as the prosecutors knew. He then went to Rio, where the *Bella* lay, bound for New York. Jules Berand saw

Roger on board, and would be called as a witness; so would two Captains in the merchant service, who also saw him. The ship sailed on the 20*th April*, 1853, commanded by Captain Birkett. Four days after, the long-boat of the *Bella* was picked up at sea. The ship was never heard of again nor any of the crew.

"All the world," says the learned counsel "believed that Roger Tichborne was dead. One poor, crazy, misguided soul alone refused to listen to the voice of reason—refused to believe that her first-born son was dead. Gentlemen I have now finished with the life of Roger Tichborne, and I shall have to ask you whether the man who sits there is the young man whose history I have given you. If he is, then he is wrongly charged in this indictment. If he is not, then he is undoubtedly guilty, for he has sworn that he is the man."

Let it be now remembered that all the story of the Tichborne family and all the material incidents in the life of Roger are before the jury. They know his education, his connections, his constitution, his character, his disposition, even his eccentricities; they know his tender feelings towards, and respect for, the lady he was villainously said to have seduced. They have daguerreotype likenesses of his features; they have more than daguerreotype likenesses of his mind. They know that he was a constant letter writer, and not the man to cease from writing for eleven years if he had been alive; and they know that his letters ceased to come after his disappearance in the *Bella*, where all were lost. They know that he was pretty

keen with regard to monetary arrangements, and that he knew the exact time when he could increase his allowance, and that he was fond of the wandering life of adventure and freedom he was leading.

Here was his portrait then, by a master hand and, I have no hesitation in saying that it could not have been surpassed by human skill. We have him from childhood to youth, from youth to the stripling officer in the Hussars, and onward then a little further till he becomes the adventurous explorer of the South American wilds; thence onward again to his departure in the *Bella*, when we lose sight of him for ever. In all these changes and vicissitudes there is not an instance of his acting contrary to the instincts and breeding of a gentleman. We gather this from the picture of his life, and important it is to remember. We know, also, that he was not a clever, and far less, a cunning youth, a not unimportant feature of his character to bear in mind. The face may change, but mental capacity is stamped with an unchangeable quality; it may brighten or tarnish, but it never loses its characteristics.

With this portrait closes the first act of this wonderful drama.

The next scene is also artistic, and the "arrangement" might be called an arrangement in black and white. Mr. Hawkins likes contrasts. He knows the effect of these on juries, and so he opens the next act in these words:—

"I have now to direct your attention to the life of a very different person—the life of *Arthur Orton*,

the son of a respectable butcher at Wapping. If the defendant is the man, then he certainly is guilty, for he has sworn that he is not."

A good, straight way of putting it

Then the jury are reminded that although he may not be Orton it does not follow that he is Tichborne. But if he be Orton, as is now going to be shown, then, of course, he is guilty of both perjuries.

Arthur Orton lived at 69, High Street, Wapping, with his father, George Orton, who had a numerous family. Arthur was born on the 1st of June, 1834. He was poorly educated, could read and write, and had a little arithmetic. He was afflicted from infancy with St. Vitus' dance; and in 1848 it was suggested he should go to sea with a view to getting rid of this malady. Accordingly, he sailed *via* Antwerp for Valparaiso in a ship commanded by Captain Brooke. Captain Brooke was dead, but his widow, since remarried to a Mr. Howell, could be called, and she would say that the defendant, to the best of her belief, was that Arthur Orton.

In November, 1848, Orton was at Valparaiso. In January, 1849, he went there again, having deserted from his ship, and thence to Mellipilla, where he made the acquaintance of a family named *Castro*, who treated him kindly. In February, 1852, he left Chili in the name of Joseph Orton, but *with the seaman's number of Arthur Orton*. He sailed in the *Jessie Miller*, came home, and went to Wapping. He had by this time so increased in bulk that he was called "Fatty Orton." He paid his addresses

to one, *Mary Ann Loader*, the daughter of a lighterman, who would be a witness—doubtless to say that the defendant is her old lover.

In December, 1852, he sailed on board the *Middleton* for Hobart Town; *James Lewis*, captain; one, *James Peebles*, boatswain; while one of the seamen was named *Owen David Lewis*. On board the ship he wrote to Miss Loader, which letter was read, and which, with other letters of the defendant, would show *the difference in handwriting and style from those of Roger of the same period*. The spelling was, indeed, remarkable; "writing" is spelt without a "g;" "few is written *fue*;" "enquiring" is spelt *enquireen*. But this, of course, does not matter if the defendant be not that Arthur Orton; he, in that case not being responsible for the bad orthography of the Wapping Butcher. But if he is shown to have written these letters, the probability is the jury will identify him with that same butcher. Let us follow then his history. He went *in the "Middleton" as a butcher*. In April, 1853, he arrived at Hobart Town, and in that town a family connected with the Ortons was settled. Their name was *Jury*. He took a letter of recommendation to these Jurys, and Mrs. Jury would be called as a witness, not to prove merely that Orton came there, but that this defendant was that Orton; so he will have a double benefit of trial by Jury.

A Mr. Hawkes, of Hobart Town, who bought meat of him would depose to the same fact. He remained there as a butcher till 1855. The jury are asked at this stage to bear in mind that at this time Roger

Tichborne was in *South America*. Orton borrowed £14 from Mrs. Jury, and gave a note of hand bearing date 1855. *That, therefore, fixes his exact whereabouts at that time.* Note was due in August, but when August came Arthur was gone.

In the latter part of 1855 or beginning of 1856, Orton was in the service of a *Mr. Johnson, at Newburn Park Gippesland, Australia*. In 1856 he was in the service of a *Mr. Foster*, where he remained till March, 1868. In that month he was at Dargo, which is proved by a document dated Dargo, *March 11th, 1868*. Orton remained here between one and two years; a Mr. Hopwood would prove this fact, for he saw him at a place called *Sale*, where he was engaged in breaking horses, and this witness also will prove that he saw the same Orton in 1863 at *Wagga-Wagga*. He was in the service of a *Mr. Higgins* there, and this evidence is corroborated by *the defendant himself, who had admitted that he was in the service of a Mr. Higgins in 1865;* so here is truly a matter of great importance! The man the the learned counsel has been tracing all along as Arthur Orton turns out in 1865 to be Roger Tichborne! Could there possibly have been a transmigration of Roger's soul? Now, Hopwood, who had known this same defendant as Arthur Orton, and esteemed him as "his old friend," met him one day in Wagga-Wagga in Higgins' shop, and went in and spoke to him, calling him by his old name. Alas? the mutability of human names!

"I am not Orton," says the defendant, "I am *Castro*. Come and have a drink."

But whether Orton or Castro *he remembered Hopwood*. They drank; they talked of old times; Castro asked after *old friends*, and as they got more chatty, Castro tells his friend why he had changed his name —"there was a warrant out against him about some horses."

"Now," says the learned counsel, "Hopwood will tell you that *the man there is the same man he had known in Gippesland*, at *Dargo*, at *Boisland*, and at *Sale*." And in addition to this, another witness would prove he saw defendant at work as a butcher in Mr. Higgins' shop. On the 20th of January, 1865, this Castro was married to *Mary Ann Bryant*, describing himself as born in Chili, and giving his age as thirty years—same age as Arthur's. After his marriage he lived at Wagga-Wagga in a state of abject poverty, and became at last acquainted with one, *Gibbes*, an attorney—a great comfort, no doubt, to one in abject poverty, and better to know than a constable with a warrant 'about some horses' one would think. Now comes an apparent break in the story; but a break by no means, for it becomes the key to all the future conduct of this Castro. 'Poor Lady Tichborne,' says the learned counsel, 'alone of all the world, clung to the belief that her son was not really dead.' No tidings had been heard of the *Bella*, no news of the vessel or the crew, but still she clung to that belief. She was, moreover, not on good terms with the Tichborne

family, and was not satisfied with the settlements. She had been left out in the cold, with no provision beyond her marriage settlement. Her income was limited. 'Now,' says the learned counsel, 'such a person would be a ready tool to an impostor, supposing her own reason to be blinded by her feeling and her delusions.'"

A very good and striking way of putting it. No one could do better than that, Cicero or no Cicero.

"Still, during her husband's life she took no active steps in the matter; but in 1862 her husband died. The voice of the only person who could influence or console her was thus silenced, and she at once set to work advertising for her son. In 1863 she advertised in the *Times* and in the Australian papers, and in that year the death of her husband, James Tichborne, was announced *in the "Home News" in Australia.* But it is not easy to ascertain the exact time when it first occurred to anyone that this slaughter-man would set up this monstrous claim to the Tichborne title and estates." But this is clear that *it was after the advertisement* and the announcement of the death of the last baronet—an important point, which the jury note. Here springs a huge mountain range of probabilities!

This Castro had a Hampshire acquaintance who knew something of the Tichborne family. In 1865, however, he knew little of the Tichborne title or estates. Further information, therefore, would be necessary before setting up the claim, and one other matter was worth enquiring into before taking such

a step: It was desirable to find out what had become of the Orton family at Wapping. It would not do to write to Wapping in his own name or in his own hand, so he went to a schoolmaster and got him to write for him in the name of *Castro*. The reader will remember that Roger never knew Castro.

Here the learned counsel uses a strong argument in the shape of an important question or two, which will require a deal of answering, "Why on earth should he have done that? Above all, *why should Roger Tichborne write in his own name or anyone else's name to enquire after the Orton's at Wapping?* Roger, who never was at Wapping in his life, and never heard of the Ortons! Yet this man wrote in a feigned name and in another person's hand, and as a stranger, to one, *Richardson, at Wapping*, to enquire after the Orton family. *How should he have known Richardson?*—" Another important question, giving birth to a whole family of inferences.

The letter was as follows:

"Wagga-Wagga, April 13th, 1865.

"Mr. James Richardson:

"SIR:—Although a perfect stranger, I take the liberty of addressing you, and as my residence at present is in this distant Colony, I trust you will pardon the intrusion and oblige me by granting the favor I seek. I believe there was, some years ago, living in your neighborhood a person named Orton. To this man I wrote several letters, none of which have ever been answered. The letters are of importance to Orton or his family, and to no other,

so that I must conclude he has not received them, or I am certain they would be answered; besides as this district is, or lately was, in a very disturbed state, through a lawless set, who styled themselves Bushrangers, and who respected neither life nor property, I concluded my letters perhaps fell into their hands. If Orton or his family live near you still, or if you have, or can give any information respecting them, I shall forever feel grateful. I beg to say here with pleasure that one of the most notorious of the Bushrangers has fallen by a rifle-ball and that on the news of his death and doings being properly chronicled, I will send you the paper containing such.

"I trust you will not fail to oblige me by sending any information whatever respecting Orton or *his son Arthur*.

I am, Sir, your obedient and obliged servant,"

THOMAS CASTRO."

This letter, defendant admitted, was written by his dictation, and was produced. This was shortly before the claim was set up.

"So much for the origin of this most monstrous fraud," says the counsel. There was no reply to the letter. An important fact to state when the subsequent conduct of the defendant is considered.

Then comes another curious step taken by the defendant. For eleven years no letter had been received from Roger Tichborne; but in April, 1865, defendant begins to write the initials R. T. accompanied with a certain sign or hieroglyphic which

Orton always used but which *Roger had never used.* Then there was a pocket-book in which was written: "Some men has plenty brains and no money; some has plenty money and no brains. Surely the men as has plenty money and no brains are made for the men as has plenty brains and no money."

"These are the sentiments," says the counsel ironically, "of R. C. Tichborne, Bart." "Then," says the document, "Rodger C. Tichborne some day, I hope." "But Roger Tichborne never spelt his name with a 'D.'" Another entry was, "I Thomas Castro do certify that them as thinks that is my name don't no nothink about it." Then there was the name and address of "*Mary Ann Loader, Russell's Buildings, Wapping.*"

"How," asks Mr. Hawkins, "could Roger Tichborne have *her name* and address in his pocket-book?"

Then we have another important matter. At Sydney was one *Cubitt*, who kept a "missing friends' office" and issued advertisements. Lady Tichborne saw them and wrote to Cubitt. In this letter she plays into the hands of Castro by giving certain items of information concerning her son and her family. She asked Cubitt to make enquiries concerning Roger, gives his age as 32, says he embarked at Rio on the 20th April, and had not been heard of since; affirms that part of the crew were saved—gives the name of the lost vessel—thinks her son may have married and changed his name, and asks that enquiries should be made. Advertisement

accordingly issued. Orton at this time being in Wagga-Wagga.

While Gibbes the Attorney was engaged in taking Castro through the Insolvent Court, he suddenly exclaims "I've spotted you; you are Roger Tichborne; you are advertised for, and if you don't disclose yourself, I shall."

He had seem the initials, it appears, "R. C. T." cut on a tobacco-pipe, and this lead to the remarkable discovery. What could poor insolvent Castro do, being thus suddenly found out to be a baronet in disguise, and heir to thousands a year? Of course Gibbes would denounce him to the world.

This story, be it remembered, of Gibbes' discovery, was told by the defendant himself. Gibbes then writes to Cubitt, and a correspondence takes place between that gentleman and Lady Tichborne. *She gives more information*, but says she cannot send £400 until her son's identity is proved. Then she tells him to *remember* that Roger was three years at the Jesuit College at Stonyhurst, and when he was nineteen years of age went into the Dragoon Guards, where he remained nearly two years: that he passed his examination well before he got into that regiment—that he never knew his grandfather—Sir James's father having died before she married. Roger was born in Paris, she continues, and spoke French better than English, she believed; and then she says, poor deluded creature, "I enter into all these details that you may be able to know him," and she repeats that she cannot send any money

until he has been identified, and that must be in England.

Here is the twilight of Castro's dawning knowledge of Roger's early life. What a feeble glimmer for ingenious fraud to work by! But even ingenious fraud requires time; so the unfortunate baronet wanders about (not able to get any money till he is identified) until *January* 1866, and then he writes his first letter to his anxious mother. The letter is worth reading.

"Wagga-Wagga, Jan. 17th, '66.

"My dear mother. The delay which has taken place since my last letter, dated 22nd April, '54" (He has got this date from her foolish letter telling Cubitt the *Bella* sailed on the 20th), "makes it very difficult to commence this Letter. I deeply regret the truble and anxiety I must have cause you by not writing before; but they are known to my attorney, and the more private details I will keep for your own Ear. Of one thing rest Assured, that although I have been in a humble condition of Life I have never let any act disgrace you or my Family." (He forgets the change of name in consequence of the warrant about the horses.) "I have been A poor man and nothing worse. Mr. Gibbes suggest to me as essential that I should recall to your memory things which can only be known to you and me to convince you of my Identity. I don't think it needful, My Dear Mother, although I send them Manely the Brown Mark on my side and the card-case at Brighton. I can assure you, My Dear

Mother, I have kept your promise ever since. In writing to me please enclose your letter to Mr. Gibbes, to prevent unnecessary enquiry, as I don't wish any person to know me in this Country when I take my proper position and title. Having, therefore, made up my mind to return and face the Sea once more, I must request to send me the means of doing so and paying a few outstanding debts. I would return by the Overland Mail. The passage Money and other expenses would be over Two Hundred pound, for I propose sailing from Victoria, not this Colonly, and to sail from Melbourne in my own name. Now, to annable me to do this, my dear mother, you must send me——" The remainder of the letter was missing.

This letter came into the defendant's possession after Lady Tichborne's death, and was filed by him in Chancery.

"Now," asks the counsel, "what resemblance was there in this letter to the letters of Roger Tichborne?" A good question to ask in argument as to probability, and destroys an alleged fact. Then, he says, Roger Tichborne never had a brown mark on his side; his mother herself said so; and *she had no knowledge of any card-case at Brighton*; and she admonished him that the less he said about those matters the better. He took her advice, and never mentioned them again till he was cross-examined.

"How was it," asks Mr. Hawkins, "that he did not allude to any of the early incidents of his life?"

How, indeed, since he could have satisfied her of his identity by a hundred of them had he been her very son. Castro, in the meantime, mentions to several persons that he had St. Vitus's dance. This, Tichborne never had in his life, but we know Orton had this disease. He said he was educated at Winchester, and that he was only in the army thirteen days, and was then "bought off."

But *before Lady Tichborne received the letter she actually wrote to him and acknowledged him as her "dearest son Roger" without a single particle of evidence of any kind.* No wonder he began to believe in himself. She writes again and again, giving "scraps of information which were made the most of, and, among other things, mentioned that one *Bogle* was at Sydney." Bogle had been an old servant in the Tichborne family. Before leaving Wagga-Wagga Castro made his will, and that will has an important bearing upon the question as to whether he was Orton or Tichborne. He mentions his mother's name as *Hannah Frances*, when, in fact, it was *Henrietta Felicite*. It left property at *Cowes*, where no Tichborne property was, and at *Hermitage, Dorsetshire*. There was no such place; but there was a farm called Hermitage in Surrey, which had been acquired *after Roger left England*. There was mention of estates at *Ryde*, where no Tichborne estates existed. The executors were *John Jones, of Bidford, an old friend of George Orton*, and *Lady Hannah Frances Tichborne*, "my mother," and *Sir John Bird, of Herts, Bart.*, an imaginary baronet.

The defendant went to Sydney and saw Bogle, who gave him information on many points. He got from him the *Tichborne Crest*, and he found the English Baronetage. In the will no mention was made of *Upton*, and he said he made the will *purposely to deceive* the bankers to whom he applied for money. He told them he was in the *66th Regiment Light Dragoons* (*Blues*).

Next comes a letter from Lady Tichborne, telling him that he and his family were *Roman Catholics*, which rather surprised him, for having forgotten he was a Catholic, he had been married in a Wesleyan Chapel. This mistake, however, he immediately corrects, and, as a true Catholic, gets re-married *in a Roman Catholic Church* in the name of Titchborne, which he spelt with *two t's* instead of one. In answer to his mother's letter containing the information that he is a Catholic, he writes to his "dearest mamma, and *may the blessed Maria have mercy on your soul*," telling her he is *grieved she did not know his handwriting*.

Not long after this he came home, and "on Christmas Day, 1866, Arthur Orton once more set foot on familiar soil. If Roger Tichborne had arrived," continues Mr. Hawkins, "surely he would have eagerly sought his friends and relations; the Seymours, the Radcliffes, his executor Gosford, and many other familiar friends. But Arthur Orton knew none of them. There was only one home he was familiar with, and that was in *High-street, Wapping*. There he hurried, and knocked at No. 69."

"Whose house was that?" asks Mr. Justice Lush, by no means intending any dramatic surprise. But the answer came with thrilling and sensational effect:

"The house of the late *old George Orton*, my lord!"

That was truly a memorable knock! "Old George was dead. He had left two daughters—a Mrs. Jury and a Mrs. Tredgett, and Arthur Orton went to make enquiries after them at a little public house called the *Globe*. The burly stranger asked after the old inhabitants, and at last after the Ortons. He was told the daughters were married and gone away, and that the father was dead; and then, suddenly, the landlady exclaims, '*Why, bless me, you are rather like an Orton yourself!*' 'Oh, no, I am not an Orton,' he said, 'but I am a friend of the family,' '*You seem to know all about the people here*,' *she replied*. 'Ah,' he said, 'I have not been here for fifteen years,' which was true, for that was about the time Arthur Orton went away. Next day, very early in the morning, this illustrious baronet was down at Wapping again, making further enquiries after Arthur Orton's sisters. It has to be ascertained by him whether they will recognize in him their long-lost brother, Arthur Orton. If they do not, well and good; but if they do, the voice of affection must, if possible, be silenced."

At this point in the history of the case another change occurs, which shows again the mutability of human affairs. He is no longer Castro; he is no

longer Tichborne; he plays many parts, and now comes on as one *Stephens*, a man he had met on board ship on his homeward voyage. He finds out the residence of a *Mrs. Pardon*, the sister of the husband of Mrs. Jury. After sending up his card, on which he had written "Australia," Mrs. Pardon came to him, and in answer to his enquiries for the sisters, said, '*Why you look like an Orton yourself.*' 'No,' said he, 'I am not one of the Ortons, but I am a very great friend of Mrs. Tredgett's brother.' He gave her a letter for Mrs. Tredgett. The letter is sent in, and Mrs. Tredgett appears. The letter was as follows:—

Wagga-Wagga, N. S. W., June 3rd, '66.

"MY DEAR AND BELOVED SISTER,—It many year now since I heard from any of you. I have never heard a word from any one I knew since 1854. But my friend Mr. Stephens is about starting for England, and he has promised to find you all out, and write and let me know all about you. I do not intend to say much, because he can tell you all about me. Hoping my dear sister will make him welcome, has he is a dear friend of mine, so good-bye,

ARTHUR ORTON."

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M"

It ends with the same dots and a letter *as in his letters to Mary Ann Loader*. Stephens had never seen the man until he was on board the ship."

On the 26th December he writes again, and asks for further information concerning the Ortons and

Miss Loader, saying also that she will hear something to her advantage. The address was *Post Office, Gravesend. The sister believed him to be Orton*, and had asked for his portrait; so in a feigned hand he writes on the 7th January, 1867, and says:—

"DEAR MADAM—I received your kind letter this morning, and very sorry to think you should be so much mistaken *as to think I am your brother*. Your brother is a very great friend of mine, and whom I regard has a brother. And I have likewise promised to send him all the information I can about his family. I cannot call on you at present, but will do so before long. I sent your sisters a likeness of your brother's wife and child this morning. I should have sent you one, but I have only one left, which I require for copying. I have likewise one of himself, which I intend to get some copy of. I will then send you some of each. My future address will be R. C. T., Post-office, Liverpool. Hoping to have the pleasure of making the acquaintance of my friend's sisters before long.—I remain, yours respectfully,

W. H. STEPHENS."

Having written these letters, the defendant "subsequently *denounced them as forgeries*, and then in the witness-box *was obliged to confess that he had written them*. Besides this, he sent the portraits of *his own wife and child as that of Arthur Orton's wife and child*." An awkward circumstance if he was Tichborne, and Arthur's wife and child were his! The sisters also *recognized the handwriting of Ste-*

phens as that of Arthur Orton. So he writes Arthur's handwriting, and has Arthur's wife and child. He swore that the object in going to Wapping was *to find out about Arthur Orton*, and when he swore this, the letter purporting *to be brought by him from Arthur had not been seen by his solicitor.* There was this further remarkable fact that he concealed these visits to Wapping from his legal advisers. He writes to his friend Rous on the 20th October, 1867:—

"We find the other side busy with another pair of sisters for me one of them been to see Mr. Holmes. They had been three days at them, and they are quite sure of success. Only there is this difference, which they cannot make out. The brother of them young womans is very dark, and very much marked with the small-pox very much about the face. But they are still very sure I am him. I wonder who I am to be next? the man they think I am is still living in Wagga-Wagga under an assumed name. They say I was borne in Wapping. I am glad they have found out a Respectable part of London for me. I never remember having been there; but Mr. Holmes tell me it a very respectable part of London. R. C. D. TICHBORNE."

We are then told that the defendant for some time keeps in hiding; "dare not face even the poor old lady herself without some little knowledge of the old place. So he left his wife and children behind and went down to Alresford to look at it. He put "R. C. T." upon his trunks, no doubt as a suggestion or *invitation to recognition.* If he had been the real

man, why did he not go down boldly in his own name and declare himself? Why did he not go to his attorney, or to his father's or to his old friend and executor? Instead of this he goes to an obscure public-house, and keeps himself quite concealed. Then he gets hold of the publican takes him for walks round the Tichborne estate, and gathers from him all the information he can."

Now, you will observe, the learned counsel has arrived at a point in the case where it is advisable to show the means the defendant employed to obtain what many persons thought so wonderful, *the knowledge he possessed of the persons and incidents connected with the Tichborne family.*

Lady Tichborne, in her imbecility, was first; Bogle was next; and now comes the publican. It was quite time to obtain the assistance of a solicitor, so he employed Mr. Holmes. Mr. Gosford went to Gravesend to see him, but he refused to be seen. Mr. Gosford went again; saw him, put questions to him, and told him he was not Roger Tichborne. Then the defendant writes to Rous in these terms:—"If my solicitor, Mr. Holmes, writes to you, give him any information you can, and depend upon perfect secrecy between us.

"Who was Mr. Rous?" asked the counsel. The question is very well placed, and the answer extremely important as clearing much ground in the future. It could not have come at a better time. "*An old clerk of Mr. Hopkins,*" says Mr Hawkins; "*the old family attorney, acquainted with the family*

estates. Rous could give him much information about them, and it was all important to obtain such information before the claimant faced Hopkins himself, as he would have to do. Hence the application to Rous, and hence the hint as to secrecy."

He then goes with a *brewer's clerk* and his attorney to see Lady Tichborne in Paris.

"Unable," says Mr. Hawkins, "to relinquish her long cherished idea that her long-lost son was yet alive, she still had received from him such false particulars as might well have raised a doubt in any rational mind. Still, she refused to doubt. He had talked about his grandfather, *whom Roger had never seen.* He said he was a private, whereas Roger was an officer; that he was educated at Winchester instead of Stonyhurst; that he had had St. Vitus's dance, which Roger never had. '*He confesses everything as if in a dream,*' she wrote; 'but it will not prevent me from recognizing him, though his statements differ from mine.' This was the poor bewildered old lady, who was now to be confronted with her long-lost son in the company of two strangers, one of them an attorney! He did not go to see her; she had to come to find him, and she found him *lying on a bed.*" Must have been rather a strong maternal instinct, one would think, to recognize her son through the bedclothes!

This was her meeting with her long-lost son. Then is given the defendant's own account of this affecting interview.

"*I was lying on a bed, and my mother was stand-*

ing alongside of me. I cannot say who spoke first. We conversed a long time. *I cannot say if she recognized me at once or after a time, or what.* There were others in the room who will be able to give a better account of it than me—Mr. Holmes and Mr. Leete (the brewer's clerk) and Dr. Shimpton. *I believe we were both affected at the interview.* She did not express any doubt about my being her son. Oh, no, not in the slightest." Such was this first interview between mother and child. He remained three days in Paris, and then returned to London. Mr. Holmes obtained for him the Tichborne pedigree and the *Army Gazette* containing the dates of Roger's military life, and a *copy of the Tichborne will, disclosing most important particulars as to his affairs.*

Soon after this Gosford met the defendant, and said—"If you are Roger Tichborne, you can't have forgotten the sealed packet deposited with me. What were the contents of it?"

The defendant could not say. The probability, of course, is, that if he had been Roger he could have told at once, and so have convinced Mr. Gosford of his identity. The defendant, in the course of time, we are told, filed an affidavit in Chancery, giving an account of the wreck of the *Bella*, his rescue, and voyage to Australia. But "his affidavit *was a tissue of gross and revolting absurdities.*" That is somewhat stronger than saying it was a tissue of falsehoods, because the absurdities would speak for themselves, so would the falsehoods, but they would have to be

disproved, while absurdities would not. Falsehood or not is a matter of belief; absurdity or not is a matter of common sense and sight. In order to prepare himself for cross-examination, the defendant next obtained possession of all the letters of Roger that could be laid hold of.

In the meantime he was corresponding with the Ortons, and giving them money. "Whenever they wanted money," he said, "I sent them some." "Charles Orton, brother of Arthur, was carrying on business as a butcher at *Hermitage Wharf*, Wapping. He, being poor, communicated with the defendant, and from him received letters and money; £5 a week, at first in the name of Tichborne, and then in the name of Brand. This continued up to September, 1868, so that Tichborne in his communications with Charles Orton becomes *Brand*. Rumors arose that he was supporting the Ortons, but he wrote to Holmes in October, 1868, *distinctly denying that he sent them money. The correspondence was burnt at defendant's instance*, and he got Charles to sign a declaration *saying he was not his brother*. Here you see blood must have been very strong to require a declaration. But he could never get Charles to *swear* the denial. In October, 1868, he ceased to make provision for him, and Charles *went to the other side and told them the truth about the matter*. Then the defendant made an affidavit, in which he swore —"I did not know any of Arthur Orton's family until the year 1868, when, in consequence of rumors which reached me, I called upon his sisters, whom I

then saw for the first time. *They both made an affidavit that I am no relative of them, and that I am not their brother Arthur, whom they last heard from in a letter dated August last from Western Australia.*"

"Who would imagine from this," asks the learned counsel, "that he had been long in communication with them; that he had been giving them money; that his *first visit on his arrival in England* (Christmas Eve, 1866) was to enquire after them; and that *for two years he had been in constant communication with them?*"

Who, indeed? Not the jury, one would suppose.

And here ends the third day of Mr. Hawkins' speech. And what a distance he has traveled! what a multitude of facts he has collected and arranged! Not one, so far as I can discover, out of place; not an episode in the whole case but is appropriately inserted. Surely no speech was ever better planned. You may walk over the ground he has traversed and find your way to any point without the slightest difficulty. Do you want Valparaiso? There are landmarks in the facts he has narrated which will take you direct. Do you want Hobart Town? There are the Jurys, the note of hand and the date, 1855. Do you wish to see him at Gippesland? Mr. Johnson will take you. Dargo? There's a document dated and signed. Sale? Mr. Hopwood knows all about it, and so he does of Wagga-Wagga. Do you wish to see when and wherefore he changes his name to Castro? You'll find out at Mellipilla how he gets

the name, and from Hopwood why he changes it. And so, after this opening you may, with the utmost ease, shift scene after scene and see the defendant pursuing his vocations, and even get occasional glimpses of him in the obscurity of the bush, where he wanders like a dark and suspicious figure in the pathless wilderness of unrevealed mysteries:—unrevealed, except by his own inadvertent observations, which shed a momentary glimmer on the scene, and show that he was engaged in business which only those with whom he consorted could divulge. Never was a figure more clearly traceable from point to point and from name to name. And it may fairly be said of him that when he takes the greatest pains to conceal his identity his identity stands most clearly revealed. It is strange that there is no point of contact between these two men. They never even cross each other's path, and there is scarcely a movement of either man in which you can mistake for a single moment the identity of the person. It is as impossible to confound their actions as it is to assimilate their minds and characters.

In the next chapter the learned counsel dwelt upon that part of the defendant's history which related to Chili.

"My case," he said, "is that Orton left Chili two years before Roger left England. It was necessary for the defendant, while making his claim, to write to Castro in Mellipilla to prepare him for the enquiries that would inevitably be made. So he writes

to say that he has got very fat and his relations dispute his identity; tells him he made use of his name in Australia, and never disgraced it in feats of horsemanship."

Commenting on all this, the learned counsel observes: "Orton left England for Chili in the early part of 1851, came back to Wapping, and left at the end of 1852 for Hobart Town, Roger Tichborne did not leave England until February, 1854; so that when the defendant speaks in his letter of being the same person whom Castro knew seventeen years ago, *he overruns himself by at least two or three years.*" That is a point of immense importance, which the jury note.

Now comes a letter which, the learned counsel says, "speaks volumes." It was from the *real Castro, of Mellipilla*, in answer to one from the defendant, who had signed his name as Tichborne. As the letter is described as a "crucial test" as to who the defendant really was, it is read and its main point commented on in these words: "See what it conveyed to the mind of the man who received it! 'I have received from you a letter, signed Tichborne; I assume it is your name; but the man who was staying here *bore the name of Orton, and described himself as the son of a butcher;* but there is nothing in that, and you may have mistaken the two Spanish words *canciller and carnicero*—the one meaning chancellor, the other butcher.'"

Next Holmes writes to Castro asking him whether he really knew Orton or whether Barra, the agent

of the Tichborne family, had mentioned the name to him first. He says also that *he has clear evidence that Orton is in western Australia*. The answer came that, although the defendant "had borne the names Arthur Orton he had stated they were not his own; that he belonged to the English aristocracy, and that he had played with the Queen's children." Presumably, while his father was Chancellor.

The defendant had repeatedly on oath denied that he had ever passed as Arthur Orton.

It is next proposed that the defendant should go to Chili to be seen by the people there. He is reluctant, but consents; and, in the meantime to prepare Castro for the interview, Holmes writes and tells him that "his client has *completely gained his suit in the Court of Chancery*."

Then the defendant writes to Castro, "*I have never passed under the name of Orton, so do not allow my opponents to persuade my friends that I have.*"

Holmes also writes to Castro and says:—Orton's brother and sister have seen Sir Roger, and declare he is not Arthur, and that the proceedings are the result of malice." He also sends a portrait of "*Sir Roger*," this, of course, being the defendant's own likeness. So all is arranged for Sir Roger's departfor Chili to be seen by the Chilian witnesses.

"And now," says the counsel, "you will see how he met them. There were two commissions for taking evidence—one in Chili and one in Australia;

he got that for Australia postponed, on the ground that he desired to attend the Chili commission. He swore that he was advised to do so—very good advice and very necessary, if the man were really Sir Roger. But the defendant never meant to follow it. He sailed indeed, and arrived at Rio in October, 1868; from Rio he and his companions went to Monte Video, but there they separated, his companions to follow their pre-arranged course by sea to Valparaiso, while he preferred to go by land. It was very necessary for him to do so, for this was a journey Sir Roger had taken and he had not. *He intended to study the route from Rio to Valparaiso*, but had no idea of ever presenting himself there. Conscious that he was Arthur Orton, he took care never to stand face to face with Castro. So he never went to Chili after all. The commission was delayed till December, but he never came. The evidence was taken in his absence, but in the presence of his counsel. From that time the defendant had no communication with Castro or any of his Chilian friends.

Having got thus far with the case; having traced his sinuous course till "the burly stranger knocked at the door of the late George Orton, my lord," and having shown his suspicious and false dealings since that memorable knock, the learned counsel now takes up evidence which comes in here like the capital on a pillar. His edifice is nearly complete. He is not about to deal with evidence which his own witnesses are to prove, but with

that which comes from the mouth of the defendant himself. Evidence not to be contradicted or explained away, and which will remain forever as facts fitting in with the case for the prosecution, but by no manner of means capable of finding a resting-place in that of the defendant. This part, therefore, will be complete in itself, and finds its appropriate position in this part of the opening. This evidence consists in certain answers of the defendant in his cross-examination by Sir John Coleridge, contradicting many absolute irrefutable facts, and disclosing such astounding ignorance of the prominent features of Roger's life, that the idle tale will appear utterly unbelievable upon these admissions, even before other evidence in proof of the imposture can be given.

In this cross-examination came the defendant's account of the contents of the "sealed packet" which he foolishly and wickedly connected with *the alleged seduction of his cousin*—"the most foul and detestable perjury ever committed," says Mr. Hawkins. The paper deposited was this:—

Tichborne Park, *June 22nd*, 1852.

"I make on this day a promise that if I marry my cousin Catherine Doughty this year, before three years are over at the latest, to build a church or chapel at Tichborne to the Holy Virgin, in thanksgiving for the protection which she had thrown over us, and in praying God that our wishes may be fulfilled.

"R. C. TICHBORNE."

In the witness-box the defendant had feigned a reluctance to disclose it. Mr. Hawkins pertinently askes "why?" There has been two copies of this document; one was given to Mr. Gosford and the other to Miss Doughty. The defendant did not know that one had been given to her, and, finding out that Gosford's was destroyed, and thinking no copy of it could be produced, he, in February, 1868, made an affidavit, in which he says, "that before leaving England in March, 1853, I placed in the hands of Gosford the document, with instructions not to open it except in certain events, one of which I know has not happened and the other I hope has not happened."

The engagement, be it remembered, was broken off between the cousins in 1852. He was asked *what the first event was.* He answered: "My retnrn before my marriage." He was pressed upon the point and then said, "*I don't know*; *I think it was my death.*

He was then asked as to the other. He professed extreme reluctance, but at last said, "*the confinement of my cousin*!" He was asked solemnly," says Mr. Hawkins, "do you mean this lady sitting beneath me?"

"Yes."

"Do you mean to swear that you seduced this lady?"

He answered, "I most solemnly to my God swear it!"

"When?"

"In *July or August*, 1852."

In August, 1862, the defendant gave his attorney the following as the document he had deposited with Gosford:—

"In the events of my father being in possession before my return, or dying before my return, he (Gosford) was to act for him according to instructions contained in the document. In the first place, he was to have Upton to live at and there to manage the whole of the estate. He was to keep the farm in hand and show the greatest kindness to my cousin Kate and let her have anything she required. My cousin gave me to understand *she was enciente*, and pressed me very hard to marry her at once. I did not believe such was the case, nor have I since heard it was. I always believe it was said to get me to marry her at once. For this my father tried to persuade me. It also refers to the village at Prior Dene. He (Gosford) was to have the cottages repaired and also to improve the estate in general. Was also to make arrangements for Kate to leave England if that was true. Both Gosford and wife pressed me very hard to marry her at once. I do not think Mrs. Gosford knew about Kate.

"R. C. D. TICHBORNE."

Pressed at the first trial to give his recollections of it, he wrote the following:—

"If it be true that my cousin Kate D——should prove to be *enciente* you are to make all necessary arrangements for going to Scotland, and you are to see that Upton is properly prepared for her until I

return or she marries. You are to show great kindness to her and let her have everything she requires. If she remains single until I come back I will marry her. In the event of my cousin's death you are to take charge of the estates on my behalf, to keep the home farm and to repair the cottages at Prior Dene.

"R. C. D. Tichborne."

This incredible story was to be disproved by evidence; not merely by evidence which added to the improbabilities, but which would prove it to be impossible to be true. And this would be accomplished by means of dates to which the defendant had been pinned. Then the learned counsel marshalled facts and dates in the history of Roger which *proved the impossibility of the defendant's story being true.* Not only would the story be proved impossible out of the defendant's own mouth, but it would be contradicted by a body of trustworthy evidence which could not be disbelieved. "If this evidence will not satisfy the jury," said the learned counsel, "I declare to God I do not know what evidence would be required, or by what evidence a lady of honor and character could vindicate her virtue against a foul aspersion."

No wonder the learned counsel rose to this height, seeing the issue which loomed through this dark cloud of lies. It was not merely whether the defendant was Tichborne, but whether a lady, hitherto regarded as a virtuous woman, would be degraded, and perjured in the eyes of the jury, her husband, her children and the world. So, says Mr. Hawkins,

not liking to leave this point without thoroughly exhausting everything he could say upon the subject, he *will prove by Roger's letters that he was not at Tichborne at that time or anything near the time when the seduction was alleged to have taken place.* After a certain date, which was long before the time alleged by the defendant, Roger never was at Tichborne again. The sealed packet was given to Gosford in *January* 1852, while defendant in his affidavit swore it was *November*, 1852.

Next came the incredible story of the wreck, in itself *an impossibility*, as told; and let the reader bear in mind that no true story can have an impossibility in it—a false story frequently has.

Then came another impossibility. Roger's letters showed that he could never have been at Mellipilla; but Orton undoubtedly was, and his presence there gave birth to the Castro episode. In 1854, Roger sent home two daguerreotypes, and they were in the possession of Tichborne family; yet the defendant denied that he had ever sent them—a strange and short sighted denial truly!

Now comes another point relating to the wreck. During all the nineteen years that had elapsed since the loss of the *Bella*, no living being had ever been heard of as having been saved. The ship that, according to the defendant's account, had saved him was the *Themis*, which was changed to the *Osprey*, because, doubtless, he had learned that an *Osprey* had reached Melbourne about the time that would have fitted in with his story. But there are

other things required to fit in with such a story before it can be accepted as true, and to these the learned counsel calls the attention of the jury. First the size of the vessel, as stated by the defendant, was as large as the *Bella*—1800 tons—but the *Osprey* that came to Melbourne was a little vessel under 100 tons; it had no passengers and only a small crew, while the defendant's *Osprey* had a crew of ten men. He was asked the names of the captain and the crew, but he could not give one. He was pressed in cross-examination, with this remarkable result, that he gave the names of J. Lewis, J. Peebles and Owen David Lewis, which, strange to say, *were the name of the men on board the Middleton—Orton's vessel in* 1852! What a poor uninventive mind! And yet what a remarkable memory he must have had! On reaching Melborne he said he gave the captain a check, which had reached home and been acknowledged by his relatives as genuine, but had been dishonored. This was all self-evidently untrue, and required no reasoning upon whatever, but it was as well to give the defendant's own version, which was as follows:—

"Mr. Hopkins told me that during my absence a check came to Glyn, and that the money had been taken from Glyn's previously. The check was sent to Hampshire, and Mr. Hopkins got it. *He told me* it was between £17 and £18. He sent it to Mr. Greenwood, who acknowledged it was mine, but it was dishonored."

It was necessary for him to dishonor it, other-

wise the bankers' books would have been in his way. But the counsel deals with it in one argument: "This was all a fabrication and an absurd fabrication, for, of course, had any such check really arrived, it would have shown that he was alive."

Moreover, the log-book of the *Osprey* contained no account of the picking up of a shipwrecked passenger, or any reference in any way to such an incident of her voyage as he described. But the defendant had tried to meet this impossibility by another—he said it was *another Osprey*, and then he said it must have been the *Themis;* but he further swore that *eight sailors were saved with him.* Not one of these had ever been heard of.

It was thought proper to give the jury the key to the story of the £17 to £18 check, and it was this: the defendant had heard that the *Themis* had picked up a shipwrecked man at sea, so this poor shipwrecked Claimant, driven to his wit's end, and eager to catch at any straw, goes down to Liverpool to see the owner, and is so elated with his success that he writes:—

"*It is now beyond a doubt it was the 'Themis' picked me up.* The owners and agents are doing all they can to find me evidence."

So the log-book is entrusted to one of the defendant's agents, but, strange to say, there was no trace in it of any shipwrecked passenger having been saved. It was, however, discovered that a ship called the *Themis* had taken a second-class

passenger to Melborne, who had disappeared after giving the captain a check for £17 to £18. This was the origin of the story of the check. But in a short time "the mate of the *Themis* turned up, and declared it was all wrong, and then the *Themis* was dropped, and the *Osprey* taken up again."

As to the life in Australia, the defendant admitted that he had changed his name to *Morgan*, but declined to say why, on the ground that it *might tend to criminate him;* that he knew Arthur Orton, who had changed his name to Alfred Smith, because "he had done something not in accordance with law." "He admitted that his friend was charged with bushranging, which meant highway robbery; and on being asked if he was charged with Orton for that offence, he declined to say. He admitted his intimacy with Morgan, a bushranger, shot in 1865, and his intimacy with another bushranger named Tote. He was also charged in the name of Orton with *horse stealing. This he admitted.* "What more," asks the learned counsel, "need I say?"

Just one or two words, perhaps. Upon Roger there were tattoo marks not found upon this man, and upon this man there were fabricated marks, which never had existed on Roger. All the different physical peculiarities were referred to which existed in Roger, and which did not exist in the defendant; so that, according to the description, no two men could be more dissimilar with regard to unchanging signs of identity; one important sign being that the ears of Roger adhered closely to his

cheeks, while this man had pendant lobes. So having contrasted the two men's personal peculiarities, as he had contrasted their histories, manners, characters, sentiments, education and minds, he concludes with a peroration useful to the student as a study of the arrangement of a case. His last observation was as to handwriting, which he said could not deceive. The defendant's writing and spelling were writing and spelling exactly resembling Arthur Orton's, but totally dissimilar to the writing and spelling of Roger Tichborne.

It was true that he had endeavored to imitate Roger's writing after he had come to England, and after he had written to the dowager, saying—"*I hope you have got some of the letters*;" but that would not affect the judgment of the jury in any way, except by showing that the apparent resemblance of these later letters was the result of imitation. He then concludes:—

"Gentlemen, I have shown you the life, habits, education, the correspondence, the sentiments, the dealings of Roger Charles Tichborne, whom the defendant is charged with fraudulently attempting to personate. I have shown you also the life, habits, education, correspondence, conduct and career of Arthur Orton, whom we allege this man to be. No two persons could be possibly more unlike each other. I have also called your attention to the various accounts given by the defendant of his past life and career. How he would have you to believe that this high-born English gentleman, who had

rank and fortune at his command, descended so low as to forget every tie of duty and sacred affection towards those to whom he owed both; how, with birth and education, which would have enabled him to move in the highest station of society, he chose to associate with slaughtermen, highwaymen and thieves; how, from a man of honor and truth, he condescended to become a trickster and a knave; how, with audacity unparalleled for his own ends, and to cover his ignorance of the one tender secret of the man whose name he had assumed, he did not hesitate to impute to him the baseness, ingratitude and cruelty of assailing the honor of an English lady. I have shown you, moreover, how the defendant would have you believe that, with a memory said to be so marvellous as to enable him to relate with accuracy the most puerile trifles, he has nevertheless forgotten his own mother tongue, and has become oblivious of events which, once known, could never have been effaced from the memory of the man who had witnessed them. I have called your attention to the mass of living testimony which I propose to offer to you. I shall lay before you also the evidence of the dead. In December last the late Lady Doughty, with intellect unclouded, closed her eyes in death. She ended her days in peace, and ere she died, in the hour of death, and with the consciousness that in a few short moments she would enter into the presence of her God, to whom she swore, she recorded her oath that the defendant was not the man he had falsely sworn himself to be.

With such testimony, added those inferences which I invite you to draw, as reasoning men, from matters which I have called your attention, I believe I shall abundantly satisfy you that the defendant is not Roger Charles Tichborne, as he has falsely sworn himself to be, and that he is Arthur Orton, whom I allege him to be; and, lastly, that in this foul aspersion which he has made on the character and reputation of the lady whose name has been so often mentioned, he committed perjury the most daring and detestable.

CHAPTER XVII.

MR. HAWKINS' CROSS-EXAMINATION IN THE TICHBORNE CASE.

THE CROSS-EXAMINATION OF "OLD BOGLE."

MANY readers, when they see the heading of this page, will wonder who "Old Bogle" was. Very few persons comparatively have read the Tichborne case, or know the Tichborne story. They will think probably it means the "old gentleman" himself. If it did, I believe Mr. Hawkins could have effectively cross-examined him. But if the thoughtful reader has perused the analysis of the opening speech in the prosecution of Orton he will know that Old Bogle was an old black servant of the Tichborne family; that he was at Sidney at the time Castro commenced to make his claim to the estates; and that Roger's

mother, "the poor deluded creature," had written and told Castro that fact. It was from Bogle the Claimant obtained almost his earliest information of the family of the Tichbornes.

The cross-examination of this witness is interesting from many points of view. It affords specimens of artistic workmanship and of variations of style employed for the purpose of producing different effects, but always with the view of minimising his evidence or discrediting it by eliciting contradictions. I shall give only two illustrations, opposite in their character and widely different in their objects; the purpose of the one being to lay before the jury the sources from whence the alleged imposter obtained the knowledge which he undoubtedly possessed of many incidents in the Tichborne family; the design of the other being to break down the witness on the ground of his unreliability, and especially when speaking to the identity of the Claimant,, and the circumstances attending the earlier years of Roger's life. The reader will see how humor and ridicule may some times be made to play an important part in cross-examination. The following is the general nature of the evidence the cross-examination was directed to elicit:—

1. That Bogle and his son had been ever since their return to England *dependants on the Claimant for support;* that they had shared his home and lived upon his hospitality; and therefore the natural inference would be at the outset that Old Bogle was a zealous and prejudiced partisan.

2. Bogle's intimate knowledge of the Tichborne family and its history; his acquaintance with innumerable details of the life and character of Roger; his recollection of the minor incidents of Roger's childhood and boyhood up to the period of his leaving England on his ill-fated expedition.

3. His intimate knowledge of the situation and character of the Tichborne estates; of Upton; of the rooms in Tichborne House, their furniture and pictures; of the names of Roger's nurses and the neighbors with whom he had been acquainted; even the trivial and minuter details were to be shown as within his powerful recollection, such as the kind of frocks the child wore, and the childish frolics he used to indulge in.

All this would be of immense importance, as the reader will see, as so much stock-in-trade to a man who was about to set himself up in the business of personating that child grown into manhood. It had been said over and over again by persons who had not read the case, and their name was legion, "This must be the right man, or *how could he have known all these things.*"

This is precisely what Mr. Hawkins's cross-examination is about to be directed to—namely, *to show that the Claimant's knowledge was the knowledge of Old Bogle*, and not his own in reality; and if I mistake not, it will show that the pretended recollection of the Claimant, is *not the recollection of a child grown into a man, but of one who was a man when the incidents occurred!* The claimant, as I read the

evidence *knew somewhat more* than he would have recollected if he had been the real Roger. He recollected with the crammed mind of a man and not with the artless memory of a child. Hence we have another category of objects to which the cross-examination was directed. It was this:—

Godwin's Farm and its occupants.

Old Etheridge, the blacksmith of Upton.

The Nobles, who kept the "Dairy Farm."

Mr. Baigent, who called himself "a connection of the Tichborne family," and came to clean the pictures—to wash, in fact, the faces of remote ancestors.

Mr. Hopkins, the family lawyer.

Mr. Slaughter, and many others.

All these had doubtless been known to the boy, but they were far better known to Old Bogle, and his recollection of them would be keener than that of the real man, who knew them only as a child. Just imagine for a moment a clever cunning man like the Claimant gathering materials from so boundless a store as this, and can you wonder that he should show a surprising knowledge of some incidents in Roger's early life?

Then came another group of things which Bogle was asked about and gave information upon, showing again the acquired knowledge of the man, and that of the most minute and circumstantial kind, such as no grown-up child would recollect.

Miss *Doughty's bay mare*, *Roger's dog "Spring,"* *Powell*, who taught Roger the French horn, and the

visits of Lady Tichborne to the family seat. Bogle also knew the *Nangles*, *Walter Stickland*, a friend of Roger's, *Tom Muston*, the groom; *Moore* a servant; *Carter*, another servant and *McCann*. He has also heard of Clarke, Roger's servant in Ireland having been killed—a most important fact for Roger to remember, even if he had forgotten the name of the man who had given him a lesson or two on the French horn, or had forgotten the name of one of the grooms, or those of the other servants, with whom he would not be familiar, although Bogle would. So it was a good thing in the cross-examination that Old Bogle let slip the fact that *he had heard all about Roger's servant having been killed.* And let the reader note where it comes in—*all in the midst of a lot of unimportant matters of detail* which are poured upon him like corn out of a sack. Poor Old Bogle! He didn't think he was doing any harm. Even the French horn did not seem to him an instrument out of which anything could be made to turn against the Claimant; "because," thought Bogle, "Roger ought to recollect about the French horn he couldn't forget it," although it was mixed up in cross-examination with such variety of small matters as tended to show *whose* memory it was—Bogle's or the boy's.

Thus the cross-examination was directed to the sources from whence the Claimant obtained the information which he so adroitly used to prove he was the heir to the estates.

The next point in the cross-examination was to

show that after Bogle left England and took up his residence in Australia, his two sons followed in the course of two or three years, *bringing with them information up to date.*

It was one of these two sons, Andrew, who, as the cross-examination shows, gave the witness a piece of paper. This paper showed clearly enough that when Old Bogle went to the hotel where the Claimant was staying in Australia he *went to greet Sir Roger rather than to ascertain whether or no it was he.* He went "possessed with the idea" that the person he was to meet was in fact the veritable Roger; and then one of two things must follow—if he went as a rogue to assist in the perpetration of a fraud, he would willingly communicate all he knew of the family and estates, and if he went as a fool he could easily be drawn by a cunning impostor to impart the same information.

Then we get the cross-examination as to Bogle's first interview with the Claimant, and a very interesting cross-examination it is from an advocate's point of view.

"You knew the defendant at once?" asks Mr, Hawkins.

"Yes," answers Bogle.

"He was exactly like?"

"Yes; I knew him from his likeness to his uncle."

"And that was how you recognized him?"

"Yes."

"At first sight?"

"At first sight."

"Not from his likeness to Roger?"

"Not exactly."

There's a good deal of difference between him and Roger, is there not?"

This question was a sort of petard, and Bogle, having been got ready by the previous questions, must be hoisted upon it, struggle as he may; he struggles thus:

"He is stouter," says Bogle.

"A great deal stouter?" repeats Mr. Hawkins.

"No; not a great deal."

"What, was Roger stout?"—The "what" startles Bogle.

"No."

"Was he thin?"

"Yes."

"Very thin?"

"Yes."

"Narrow-chested; pigeon-breasted?'

"They say so; but I didn't think he was by measurment."

"Don't talk of measurment. Was he not narrow in the front part of the chest?"

"He appeared so."

"Did you think the defendant narrow and pigeon-breasted?"

"No; he was stouter."

"And broader?"

"Yes."

"Taller?"

"No; about the same height."

"Had Roger a long neck?"

"Well, I don't know if longer than usual. As he was thin it appeared to be so."

"The defendant's did not appear so? did it?"

"It appeared stouter because he was stout."

"As to the face?"

"The upper part was like Roger's."

"What do you say to the lower part?"

"Well, his nose was injured."

"But the lower part—the chin?"

"*It was shorter.*"

"Roger's was long?"

"Rather."

"And pointed?"

"*Yes, I think so.*"

Now a direct point-blank contradiction of what the defendant had sworn in the former trial is obtained in this way:

"Do you know whether he had heard you were in Sydney?"

"He had seen Guilfoyle (the old family gardener). I don't know whether Guilfoyle had told him anything. (The dowager's letters to the defendant had mentioned that Bogle was in Sidney, and was quite black).

"Did he tell you he knew you were in Sydney?"

"Yes he did."

"Did he show you a letter of the Lady Tichborne?"

"He did."

"Did he ask you if you knew her handwriting?"

"Yes, he did."

"Did he put the letter in your hand?"

"Yes, he did."

"Did you read it."

" I couldn't, as I had not got my glasses."

"Did he ask you if you knew the handwriting?"

"Yes, he did; and he told me his mother had written and told him I was there."

"Did he say he had been making enquiries about you?"

"He said he was going to advertise for me."

The course thus clear, the cross-examination of the defendant is now referred to, and that portion of it read where the defendant swore that *the name of Bogle never had been mentioned to him until he saw him.*

"But you knew at the time that Bogle was there?"

"*I did not,*" swore the defendant in his previous examination.

"Had not you received your mother's letter?"

"No, not at that time."

We have then up to this point, upon the facts, Bogle's absolute contradiction of himself with reference to his recognition of the Claimant, and his direct contradiction of the Claimant with regard to Lady Tichborne's letter, which had informed him that Bogle was in Sydney.

I will now give another example from the cross-examination of this witness. It refers to the important subject of the tattoo marks which were proved to

have been upon Roger's arms before he left England. As the defendant had no such marks, Bogle swore that if Roger had ever had such a thing he, Bogle, *must have seen then*, for Bogle *had been with Roger on three occasions, and had seen Roger's arms bare, and no tattoo mark was there.* Positive point-blank swearing this, dealt with in the following manner:—

"You say," asks Mr. Hawkins, that "on each of these occasions Roger had on a pair of black trousers, with his braces tied round his waist?"

"Yes."

"Was the night shirt buttoned up to the throat?"

"Yes."

"The sleeves, how were they?"

"Loose."

"Well?"

"Well," says Bogle.

"What then? What did you see?"

"I saw him rub his arm."

"Simply rubbing his arm, like this?"

"He just rubbed one arm and then the other."

"Both at the same time?"

"No, not both at the same time; first one and then the other."

"Do you know why he rubbed his arm?"

"I suppose it itched! I don't know."

"But what did you think when you saw him rubbing his arm?"

"I thought he'd got a flea," says the innocent Bogle, little dreaming how big a flea that was.

"A flea!" says Mr. Hawkins, amid immense laughter.

"Yes, I thought so."

"Did you see it?"

"No, of course not, Mr. Hawkins."

Where abouts was it? Just show me?"

Bogle points out the place, just about two inches above the elbow.

"Can you tell me what time this was?"

"About ten minutes past eleven," says Bogle.

"That's the first occasion."

"Yes; but it occurred three times, I've told you."

"And on each occasion you had the same opportunity of seeing his naked arms?"

Just the same."

Now let's come to the second occasion. Did he do the same thing?"

"He did the same thing."

"Was this about the same time?"

"About the same time."

"About ten minutes past eleven?"

"Yes; because I left him about——"

"I don't want to know your reasons. Did he just rub one arm so, and then the other so?"

"Yes; he was rubbing his naked arm."

"And each time you had the opportunity of seeing it?"

"Each time I saw it."

"Rubbed it outside?"

"I don't know what you mean by outside."

"Did he always put his hand inside?"

"Inside of a shirt," says the confused Bogle; "Always put his hand in—I don't know."

"But I want you to know—you recollect it you say?"

"If your shirt was unbuttoned, and you was rubbin' your arm, Mr. Hawkins, you would draw your sleeve up."

"Never mind what I should do," says the cross-examiner, "I want to know what you say Roger did. Why do you think he rubbed his arm this time?"

"I suppose the same as before.'

"A flea?"

"I suppose so."

"But did you see him, Bogle?"

'I told you, Mr. Hawkins, I did not."

"Excuse me, that was the first one."

"Well, this was the same."

They had to wait some time, because the laughter was perfectly irresistible, and no amount of usher power could restrain it. And upon so important a point this laughter was as good as many witnesses against the theory of their being no tattoo marks, and Bogle's evidence of their non-existence. At length Mr. Hawkins continues:—

"You say there were no buttons on the sleeves, Bogle?"

"I don't believe there was, Mr. Hawkins."

That is a good fair start for witness and counsel. It begins like a nice friendly conversation, as calmly as possible.

"Do you know," asks the counsel, "whether there were buttons or not?"

"I don't believe it."

"But do you *know*?"

"I do not know."

"But I daresay you know this—that if a man has no shirt-buttons his sleeves would fall open a good deal?"

"I know every man has shirt-buttons, but they come off."

"Were the sleeves made to button?"

"Yes, of course."

"And on every one of the three occasions it happened to be unbuttoned?"

"Each time I saw it."

"Now let us come to the third occasion. Do you recollect that?"

"I do."

"Do you recollect which arm you saw?"

"I saw both."

"Both arms up to the elbow?"

"Occasionally."

"Just point out where it was you saw him rubbing."

Bogle points out the spot.

"That's the same place as before?"

"The same place."

The same place on all three occasions?"

"Yes."

"With sleeves unbuttoned?"

"Yes."

"Why did you notice them particularly?"

"If you pull up your sleeves," says Bogle, "I can see it without noticing it particularly,"

"But you would not notice my arm?"

"If I was sitting with you, and there was two sleeves, and if you rubbed your arms, would I not see you?"

"You would look at my arm and notice it particularly, so as to recollect the circumstance for five-and-twenty years, would you?"

"I would be noticing what you was doing."

"Do you seriously mean to say you took notice of his arms?"

"I seriously mean to say I saw him rubbing his arms, and saw no marks on them."

"When did you first recall these circumstances to memory?"

"What circumstances?"

"These summer evening rubbings of his arms in 1851."

"I don't know."

"When did you first of all remember it?"

"I thought of it when I first heard the tattoo marks mentioned."

"Yes?"

"And I said if he was tattooed I ought to have seen it."

"On the last occasion, did you think it was the flea again?"

"I suppose so."

"What time was it? About the same time?"

"Yes."

"Ten minutes past eleven?"

"Yes."

"Then all I can say is, he must have *been a very punctual old flea.*"

Which observation is enough for Bogle and his evidence. It explodes amid a peal of laughter.